

Supreme Court, U. S.
FILED

JUL 15 1976

IN THE

MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1976

No. 76-58

SAMUEL H. SLOAN, SAMUEL H. SLOAN & CO.,

Petitioners,

-against-

SECURITIES & EXCHANGE COMMISSION, UNITED STATES OF AMERICA AS THE SECURITIES & EXCHANGE COMMISSION, NATIONAL QUOTATION BUREAU, INC., BUNKER RAMO CORP., NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., DISCLOSURE, INC., NATIONAL CLEARING CORP.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

SAMUEL H. SLOAN
Petitioner, pro se
917 Old Trents Ferry Rd.
Lynchburg, Va. 24503

DICK BAILEY PRINTERS, 290 Richmond Ave., Staten Island, N.Y. 10302
Telephone: (212) 447-5358

TABLE OF CONTENTS

	<i>Page</i>
Opinions Below	2
Jurisdiction	2
Questions Presented	3
Constitutional Provisions Involved	3
Statutory Provisions Involved	6
Rules Involved	6
Statement of the Case	7
Reasons for Granting the Writ	17
Argument	21
Conclusion	31
Appendix:	
A—Opinion of the United States Court of Appeals for the Second Circuit Dated March 4, 1976	1a
B—Order dated April 16, 1976 Amending the Opinion of March 4, 1976 and Denying the Petition for a Rehearing	6a
C—Order Dated April 16, 1976 Denying the Suggestion that the Rehearing be in banc	8a

D—Oral Decision of the United States District Court for the Southern District of New York Rendered on February 14, 1975	9a
E—Judgment Entered by the Clerk of the United States District Court for the Southern District of New York on February 26, 1975	20a
F—Opinion Dated May 10, 1976 of the United States Court of Appeals for the Second Circuit in a Related Case	22a

AUTHORITIES CITED

CASES:

<i>Albertson v. Subversive Activities Control Board</i> , 382 U.S. 70 (1965)	26
<i>Blue Chip Stamps v. Manor Drug Stores</i> , 421 U.S. 723 (1975)	27
<i>Bouie v. Columbia</i> , 378 U.S. 347 (1964)	28
<i>Bradley v. Richmond School Board</i> , 416 U.S. 696 (1974)	23
<i>California Bankers Association v. Schultz</i> , 416 U.S. 21 (1974)	26
<i>Carter v. Stanton</i> , 405 U.S. 669 (1972)	21
<i>Coates v. City of Cincinnati</i> , 402 U.S. 611 (1971)	28

<i>Connally v. General Construction Co.</i> , 269 U.S. 385 (1926)	25,28
<i>Ernst & Ernst v. Hochfelder</i> , — U.S. —, 47 L. Ed. 2d 668 (March 30, 1976)	27
<i>Federal Maritime Commission v. Seatrain Lines</i> , 411 U.S. 726 (1973)	20
<i>Federal Power Commission v. New England Power Co.</i> , 415 U.S. 345 (1974)	27
<i>Fusari v. Steinberg</i> , 419 U.S. 379 (1975)	23
<i>Gonzalez v. Automatic Employees Credit Union</i> , 419 U.S. 90 (1974)	17
<i>Goosby v. Osser</i> , 409 U.S. 512 (1973)	3,17,18
<i>Gordon v. New York Stock Exchange</i> , 422 U.S. 659 (1975)	19,24
<i>Greene v. McElroy</i> , 360 U.S. 474 (1959)	27
<i>Grosso v. United States</i> , 390 U.S. 62 (1968)	26
<i>Harwell v. Growth Programs</i> , 451 F.2d 240 (5th Cir. 1971), <i>rehearing denied</i> , 459 F.2d 461 (5th Cir. 1972), <i>cert. denied</i> , 409 U.S. 876 (1972)	19
<i>Jones v. S.E.C.</i> , 298 U.S. 1 (1936)	26
<i>Jordan v. DeGeorge</i> , 341 U.S. 223 (1951), <i>rehearing denied</i> , 341 U.S. 956 (1951)	28

<i>Larson v. Domestic & Foreign Corp.</i> , 337 U.S. 682 (1949)	21
<i>Marchetti v. United States</i> , 390 U.S. 39 (1968)	26,28
<i>National Cable Television v. United States</i> , 415 U.S. 336 (1974)	27
<i>O'Connor v. Donaldson</i> , 422 U.S. 563 (1975)	21
<i>Oscar Gross & Son v. Lumbermans Mutual Casualty Co.</i> , 422 F.2d 1278 (2d Cir. 1970)	23
<i>Panama Refining Co v. Ryan</i> , 293 U.S. 388 (1935)	27
<i>Ricci v. Chicago Merchantile Exchange</i> , 409 U.S. 289 (1973)	19,20
<i>Schechter Poultry Corp. v. United States</i> , 295 U.S. 495 (1936)	27,28
<i>Scheuer v. Rhodes</i> , 416 U.S. 232 (1974)	21
<i>Screws v. United States</i> , 325 U.S. 91 (1945)	21
<i>See v. City of Seattle</i> , 387 U.S. 541 (1967)	27
<i>Shapiro v. United States</i> , 335 U.S. 1 (1948)	26,28
<i>Shumate & Co., Inc. v. National Association of Securities Dealers, Inc.</i> , 509 F. 147 (5th Cir. 1975) cert. denied — U.S. — (Oct. 16, 1975) ..	14
<i>Silver v. New York Stock Exchange</i> , 373 U.S. 341 (1963)	19

<i>Singleton v. Wulff</i> , No. 74-1393, — U.S. —, decided July 1, 1976	18
<i>Sloan v. Canadian Javelin Ltd.</i> , Docket No. 75-7096 (2d Cir. Feb. 6, 1976), cert. pending No. 75-1901 ..	16,22
<i>Sloan v. S.E.C.</i> , 527 F. 2d 11 (2d Cir. 1975) cert. denied No. 75-1507, (June 14, 1976)	16,22,25
<i>Sloan v. S.E.C.</i> , slip op. 2377 (2d Cir. March 4, 1976) ..	2
<i>Sloan v. Ward</i> , Docket No. 75-3001 (2d Cir. January 16, 1975)	22
<i>Sloan Shipyards Corp. v. United States Shipping Board Emergency Fleet Corp.</i> , 258 U.S. 549 (1922)	21
<i>Sugar v. Curtis Circulation Co.</i> , 377 F. Supp. 1055 (S.D.N.Y. 1974) reversed sub. nom. <i>Carey v. Sugar</i> , — U.S. —, 47 L.Ed. 2d 587 (March 24, 1976)	18
<i>The Moss Taylor</i> , 71 U.S. (4 Wall) 411 (1867) ..	18,23,24
<i>United States v. Darby</i> , 312 U.S. 100 (1941)	28
<i>United States v. Lovett</i> , 328 U.S. 303 (1946)	16
<i>United States v. Morton Salt Co.</i> , 338 U.S. 632 (1950) ..	28
<i>United States v. National Association of Securities Dealers, Inc.</i> , 422 U.S. 694 (1975)	20,23
<i>United States v. Reliable Transfer Co.</i> , 421 U.S. 397 (1975)	29

<i>Wood v. Strickland</i> , 420 U.S. 308 (1975)	21
<i>Yakus v. United States</i> , 321 U.S. 414 (1944)	28
United States Constitution:	
Article I, Section 1	4,12
Article I, Section 8, Clause 3	5,12
Article II, Section 1	5,12
Article III, Section 1	5,12
Article III, Section 2, paragraph 1	5,18,24
Fifth Amendment	5,12
Ninth Amendment	5,12
Tenth Amendment	5,12
Statutes and Rules:	
Sherman Act	
15 U.S.C. §1	6
15 U.S.C. §2	6
Clayton Act	
15 U.S.C. §14	6
Securities Exchange Act of 1934	
§12(g), 15 U.S.C. §78l(g)	6,18,19
§12(k), 15 U.S.C. §78l(k)	6
§15(c)(2), 15 U.S.C. §78o(c)(2)	6,25
§15(c)(3), 15 U.S.C. §78o(c)(3)	6
§15(c)(5), 15 U.S.C. §78o(c)(5)	9
§15A(n), 15 U.S.C. §78o-3(n)	19
§17(a), 15 U.S.C. §78q(a)	6
§19(a)(4), 15 U.S.C. §78s(a)(4)	9
§27, 15 U.S.C. §78aa	6,12
§32, 15 U.S.C. §78ff	28

Securities Acts Amendments of 1975	19,28
Judicial Code	
28 U.S.C. §1254(1)	2
28 U.S.C. §2101(c)	2
28 U.S.C. §2201	6
28 U.S.C. §2282	3,6,10
28 U.S.C. §2284	3,6,10
28 U.S.C. §2674	6
41 U.S.C. §252(c)(10)	30
S.E.C. Rule 10b-5, 17 C.F.R. §240.10b-5	6
S.E.C. Rule 12b-7, 17 C.F.R. §240.12b-7	6,8,12
S.E.C. Rule 15c2-11, 17 C.F.R. §240.15c2-11	6,8,9,12,25,28
S.E.C. Rule 15c3-1, 17 C.F.R. §240.15c3-1	3,7,12,13,25
S.E.C. Rule 17a-5, 17 C.F.R. §240.17a-5	7,12,26,28
Fed. R. Civ. P. 12(b)	10
Fed. R. Civ. P. 12(c)	10
Fed. R. Civ. P. 55	10
Fed. R. Civ. P. 56	10
Supreme Court Rule 19(1)(b)	17
Supreme Court Rule 19(1)(k)	24
Supreme Court Rule 23(1)(d)	6

Rule 4(A), Calendar Rules for the Southern District of New York	22
Rule 9, General Rules for the Southern District of New York	10
OTHER AUTHORITIES:	
Address of Ray Garrett, Jr., Chairman of the Securities & Exchange Commission, to the Society of Business Writers, May 6, 1975	30
Brief filed by the Securities & Exchange Commission in the Court of Appeals	26
L. Loss, Securities Regulation, Vol. 1 P. 178 n. 1	18
Report of the Senate Banking Committee, S. Rep. No. 93-865, 93rd Cong. (1974)	19
Senate Report No. 94-75, 94th Cong. 1st Sess. (1975)	19,28
<i>Samuel H. Sloan, Securities Exchange Act Release No. 11376 (April 28, 1975), 6 S.E.C. Docket 772</i>	16

In the
 Supreme Court of the United States
 October Term, 1976
 No.

SAMUEL H. SLOAN, SAMUEL H. SLOAN & CO.,
Petitioners.

-against-

SECURITIES & EXCHANGE COMMISSION, UNITED STATES OF AMERICA AS THE SECURITIES & EXCHANGE COMMISSION, NATIONAL QUOTATION BUREAU, INC., BUNKER RAMO CORP., NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., DISCLOSURE, INC., NATIONAL CLEARING CORP.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit dated March 4, 1976 which affirmed the judgment of the United States District Court for the Southern District of New York that dismissed the action and to review the decision dated April 16, 1976 which amended the decision of the United States Court of Appeals for the Second Circuit and which otherwise denied the petition for a rehearing and the suggestion that the rehearing be in banc.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit has been reported as *Sloan v. S.E.C.* slip op. 2377 (2d Cir. March 4, 1976) and is included as Appendix A to this petition. The decisions of the United States Court of Appeals for the Second Circuit dated April 16, 1976 which amended the prior decision of that court and which denied the petition for a rehearing and the suggestion that the rehearing be in banc are included as Appendix B and Appendix C to this petition. The oral decision rendered on February 14, 1975 by the United States District Court for the Southern District of New York, which denied various motions of the plaintiff and dismissed the action, is included as Appendix D to this petition. The judgment of the United States District Court for the Southern District of New York which was entered by the clerk of that court on February 26, 1975 is included as Appendix E to this petition.

JURISDICTION

The opinion of the United States Court of Appeals for the Second Circuit was entered on March 4, 1976. On April 16, 1976, this opinion was amended and a petition for a rehearing and a suggestion that the rehearing be in banc was denied. Jurisdiction of this court is invoked under 28 U.S.C. §1254(1). The time within which to apply for a writ of certiorari to bring this proceeding before the Supreme Court for review is ninety (90) days from April 16, 1976 pursuant to 28 U.S.C. §2101(c).

QUESTIONS PRESENTED

1. Under *Goosby v. Osser*, 409 U.S. 512 (1973) did the United States District Court for the Southern District of New York err in denying the motion of the petitioners to convene a three judge court in accordance with 28 U.S.C. §2282 and 28 U.S.C. §2284 and in dismissing the action and did the United States Court of Appeals for the Second Circuit err in failing to reverse the United States District Court for the Southern District of New York and in failing to vacate the judgment and to remand the action with instructions to convene a three judge court to consider the question of the constitutionality of the Securities & Exchange Act of 1934 and the rules promulgated thereunder?
2. Did the courts below err in refusing to permit the petitioners to maintain an action based upon an amended complaint which alleged with particularity common law torts, abuses of discretion and various illegal acts committed by officers of the Securities & Exchange Commission including subordination of perjury, invasion of privacy, defamation of character, unauthorized disclosure of confidential information, disruption of the confidential relationship between attorney and client, failure to receive amendments to a broker dealer registration statement, failure to permit a broker dealer registration statement to be withdrawn, and an issuance of an "interpretation" of S.E.C. Rule 15c3-1, 17 CFR §240.15c3-1 (the broker dealer "net capital rule") contrary to the express language of the rule supposedly being interpreted?
3. Did the courts below err in holding that defendants National Quotation Bureau, Inc., Bunker Ramo Corp., National Association of Securities Dealers, Inc., Disclosure, Inc., and National Clearing Corp. are immune

from antitrust liability because their actions were taken pursuant to a scheme of securities regulation?

4. Did the courts below err in refusing to permit the petitioners to maintain an action based upon an amended complaint which alleged that defendants National Quotation Bureau, Inc., Bunker Ramo Corp. and National Association of Securities Dealers, Inc. had violated the antifraud provisions of federal securities laws in addition to the federal antitrust laws by refusing to permit the petitioners to list bid and asked quotations in the pink sheets and on the interdealer electronic quotations system known as NASDAQ in competition with other broker dealers and which further alleged that the National Quotation Bureau, Inc. had cooperated with the Securities & Exchange Commission in depriving the petitioners of their constitutional rights by, *inter alia*, refusing to accept "in name only" listings in the pink sheets and further that the Securities & Exchange Commission had also violated the antifraud provisions of federal securities laws by suspending trading in securities without giving adequate and accurate reasons therefore and by discouraging broker-dealers from entering quotations in the pink sheets?

5. Did the courts below err in permitting the amended complaint to be dismissed *sua sponte* as to Disclosure, Inc. when no motion of any kind was filed by that defendant?

CONSTITUTIONAL PROVISIONS INVOLVED

Article 1, Section 1 states:

"All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives."

Article 1, Section 8, Clause 3 states:

"Congress shall have the power. . . . To regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

Article II, Section 1 states:

"The executive power shall be vested in a President of the United States of America."

Article III, Section 1, in pertinent part, states:

"The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as Congress may, from time to time, ordain and establish."

Article III, Section 2, paragraph 1, in pertinent part, states:

The judicial power shall extend to all cases, in law and equity, arising under the constitution, the laws of the United States, and treaties made . . . ; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party. . . .

The Fifth Amendment, in pertinent part, states:

"No person shall . . . be deprived of liberty or property without due process of law; nor shall private property be taken for public use without just compensation."

The Ninth Amendment states:

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

The Tenth Amendment states:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

STATUTORY PROVISIONS INVOLVED

Section 12(g) of the Securities Exchange Act of 1934, 15 U.S.C. §78l(g).¹

Section 12(k) of the Securities Exchange Act of 1934, 15 U.S.C. §78l(k).

Section 15(c)(2) of the Securities Exchange Act of 1934, 15 U.S.C. §78o(c)(2).

Section 15(c)(3) of the Securities Exchange Act of 1934, 15 U.S.C. §78o(c)(3).

Section 17(a) of the Securities Exchange Act of 1934, 15 U.S.C. §78q(a).

Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. §78aa.

Section 1 of the Sherman Act, 15 U.S.C. §1.

Section 2 of the Sherman Act, 15 U.S.C. §2.

Section 3 of the Clayton Act, 15 U.S.C. §14.

Declaratory Judgment Act, 28 U.S.C. §2201.

Federal Anti-Injunction Act, 28 U.S.C. §§2282, 2284.

Federal Tort Claims Act, 28 U.S.C. §2674.

RULES INVOLVED

S.E.C. Rule 10b-5, 17 CFR §240.10b-5.2

S.E.C. Rule 12b-7, 17 CFR §240.12b-7.

S.E.C. Rule 15c2-11, 17 CFR §240.15c2-11.

1. Because of the length of the statutory provisions involved, they are merely cited here in accordance with Rule 23(1)(d) of the Supreme Court Rules.

2. Because of the exceptional length of the rules involved, they are merely cited here in accordance with Rule 23(1)(d) of the Supreme Court Rules.

S.E.C. Rule 15c3-1, 17 CFR §240.15c3-1.³

S.E.C. Rule 17a-5, 17 CFR §240.17a-5.

STATEMENT OF THE CASE

On May 10, 1970, petitioner Samuel H. Sloan & Co., ("Sloan & Co."), of which petitioner Samuel H. Sloan ("Sloan") is the sole proprietor, became registered as a broker dealer with the Securities & Exchange Commission ("S.E.C."). On June 26, 1970, Sloan & Co. became a subscriber to the "pink sheets" and the "yellow sheets" published by the National Quotation Bureau, Inc. ("NQB") and thereafter became a market maker in numerous over-the-counter securities, often trading more than a hundred at one time. Being a "market maker" in over-the-counter securities is an inherently risky proposition in which a broker or dealer quotes bid and asked prices to other brokers and dealers on a continuous basis and stands prepared at all times to buy or sell at least one hundred shares on the bid or the asked price of the security in which the market is being made.

In 1971, the NASDAQ system, which is an electronic interdealer quotations system on which over-the-counter markets are made, came into being. This system was operated by Bunker Ramo Corp. in accordance with a contract with the National Association of Securities Dealers, Inc. ("NASD") which required that Bunker Ramo Corp. refuse to deal with or lease Level III of the system to any broker or dealer who was not a member of the NASD.

3. The full text of Rule 15c3-1, along with changes currently proposed by the Securities & Exchange Commission, occupies forty-four (44) pages of the CCH Federal Securities Law Reporter. This rule has been amended on more occasions than can be readily ascertained including many times during the period in which this lawsuit has been pending.

As a result Sloan, who had not joined the NASD, was prohibited from making markets on the NASDAQ system.

Also in 1971, the National Clearing Corp., a wholly owned subsidiary of the NASD, was formed. The National Clearing Corp. provides a securities clearing service for members banks and brokers. In 1972 and 1973, Sloan attempted to join the National Clearing Corp. but was never permitted to do so.

On December 13, 1971, S.E.C. Rule 15c2-11, 17 C.F.R. §240.15c2-11 came into effect. This rule, which is lengthy, convolved, provides for numerous exceptions and can be waived at the discretion of the S.E.C., has the effect among others of making it illegal for a broker or dealer to resume the publication of quotations in a security which has not been actively quoted or which has been suspended by the S.E.C. unless, among other things, the broker or dealer possesses financial information concerning the issuer of the security such as a copy of a 10-K report of the issuer which is currently on file with the S.E.C. A 10-K report is an annual report required by the rules of the S.E.C. promulgated under §12(g) of the Securities Exchange Act of 1934 ("Exchange Act") to be filed by certain issuers of securities. When a 10-K report is tendered to the S.E.C. for filing, Rule 12b-7, 17 CFR §240.12b-7, requires that it be accompanied by a fee of \$250.

After rule 15c2-11 came into effect, the NQB, in an apparent effort to cooperate with the S.E.C., established policies among them the policy of refusing to accept an initial listing for any security which had previously not been actively quoted or which had been suspended by the S.E.C. even though the broker or dealer proposing to list this security was willing to agree not to publish an actual bid or an asked quotation. Since such listings were not prohibited

by Rule 15c2-11, and since the NQB operated a monopoly, this policy closed a loophole which otherwise would have enabled certain securities to be publically traded even though the issuers of those securities had not filed a 10-K report or any other financial information with the S.E.C. and consequently had not paid any fees to the S.E.C. since the filing of all of the financial reports specified in Rule 15c2-11 require the payment of a fee to the S.E.C.

On October 27, 1972, the S.E.C. entered into a contract with Disclosure, Inc. which granted to Disclosure, Inc. a monopoly over the reproduction for sale to the public of all 10-K reports and other documents on file with the S.E.C.

On June 27, 1974, Sloan commenced this action by filing a complaint which named the S.E.C. as the sole defendant. This complaint sought declaratory relief declaring Rule 15c2-11 and Sections 15(c)(5) and 19(a)(4) of the Exchange Act to be unconstitutional. Sections 15(c)(5) and 19(a)(4) of the Exchange Act authorized the S.E.C. summarily to suspend trading in any security. Sloan summed up his complaint by stating that he should be "permitted to buy and sell any security" and that he should be "permitted to list any security by name in the pink sheets."

In response to this complaint, the S.E.C. filed an answer dated August 23, 1974. At a pre-motion conference in September, 1974, the Court advised the plaintiff that the complaint as drafted was too vague and lacking in specifics and gave directions to the plaintiff as the requirements for an amended complaint. Subsequently, the plaintiff moved for leave to file an amended complaint and the Court granted this motion in the absence of opposition by the S.E.C. An amended complaint was, in fact, filed on October 22, 1974.

The amended complaint added a new plaintiff, Sloan &

Co., and six new defendants: United States of America as the Securities & Exchange Commission, the NQB, Bunker Ramo Corp., the NASD, Disclosure, Inc., and the National Clearing Corp. All parties were served and all but defendant United States of America as the Securities & Exchange Commission filed answers. Following a pre-motion conference on January 10, 1975, the Court directed that all motions to dismiss and other motions to be filed by the defendants should be filed by January 31, 1975. The Court further directed that there would be no discovery until these motions were decided.

Following this pre-motion conference, the S.E.C. moved to dismiss under Rules 12b-1 and 12b-6 Fed.R.Civ.P. and for summary judgment. The NASD, the National Clearing Corp. and Bunker Ramo Corp., appearing together, moved for dismissal and for judgment on the pleadings pursuant to Rule 12(b) and (c) Fed. R. Civ. P. and Rule 9 of the General Rules for the Southern District of New York. The NQB moved for judgment on the pleadings pursuant to Rule 12(c) Fed. R. Civ. P. The plaintiff cross moved (1) for a preliminary and permanent injunction enjoining the S.E.C. from instituting and prosecuting actions for injunctive relief, from promulgating and enforcing rules and regulations, from conducting investigations, and from undertaking any acts or practices under the color of the Securities Exchange Act of 1934 and other statutes and rules, (2) for summary judgment or judgment on the pleadings as to the S.E.C. pursuant to Rule 56 Fed. R. Civ. P., (3) for convening of a three judge constitutional court pursuant to 28 U.S.C. §2282 and 28 U.S.C. §2284, (4) for an order requiring the appearance of the office of the U.S. Attorney or, in the alternative, for a default judgment against the United States of America pursuant to Rule 55 Fed. R. Civ. P. and (5) for an order

disqualifying Dennis C. Hensley, Lloyd J. Derrickson, Robert Woldow, George W. Brandt, Jr., and Thomas L. Taylor, III from appearing as counsel for the various defendants. Furthermore, the plaintiff moved for a preliminary injunction enjoining the NQB from refusing to list his name in the "pink sheets" under any security. On February 14, 1975, following an argument of which a stenographic record was made, the court made an oral decision which granted all of the motions of the defendants and denied all of the motions of plaintiff and, in addition, dismissed *sua sponte* the complaint as to defendant Disclosure, Inc. Plaintiff then moved for reargument. This motion was denied. Following the denial of the motion for reargument, a final judgment was entered against plaintiff. An appeal to the United States Court of Appeals for the Second Circuit followed.

On March 4, 1976, in an opinion which is included as Appendix A to this petition, the Court of Appeals affirmed the judgment of the District Court. On April 16, 1976, this opinion was amended slightly and a petition for a rehearing and a suggestion that the rehearing be in banc was denied. The petitioner now requests that a writ of certiorari issue to review these decisions.

The amended complaint which Sloan filed in the District Court is 40 pages long and contains 309 numbered paragraphs. Paragraphs 1-263 set forth with particularity a variety of facts and circumstances which form the basis to the claim for relief. The remaining paragraphs contain five counts. The opinion of the Court of Appeals correctly summarized certain of the averments made in the numbered paragraphs of Count I, which attacked the constitutionality of the Exchange Act and rules promulgated thereunder, when it said:

"Sloan argues that the Act and rules constitute an unconstitutional delegation of legislative power; are overly vague; deprive him of liberty and property without due process of law; and exceed congressional power under the commerce clause."

These arguments are based upon Article I, Section 1; Article I, Section 8, Clause 3; Article II, Section 1; Article III, Section 1; and the Fifth, Ninth and Tenth Amendments to the Constitution of the United States.

In addition, as the Court of Appeals noted, Count I attacks on constitutional grounds the validity of certain specific provisions of the Exchange Act, including §27, 15 U.S.C. §78aa, which vests in the federal district courts exclusive jurisdiction over actions based upon the Exchange Act, §12(g), 15 U.S.C. §78l(g), which concerns the requirement that the issuers of certain publically held securities file financial information with the S.E.C., and §§15(c)(s) and 19(a)(4), which have since been consolidated to become §12(k) of the Exchange Act, 15 U.S.C. §78l(k), which authorizes the S.E.C. summarily to suspend trading in any security. Moreover, Count I attacks the validity of S.E.C. Rules 15c2-11, 15c3-1, 17a-5 and 12b-7, 17C.F.R. §§240.15c2-11, 240.15c3-1, 240.17a-5, 240.12b-7.⁴

Although the Court of Appeals was essentially correct in its description of the averments contained in Count I of the amended complaint, it ignored Count II of the amended complaint. That Count alleges the "several common law torts" to which the Court of Appeals referred in the first paragraph of its opinion, and in addition alleges abuses of

4. The amended complaint does not cite Rule 12b-7 by number. However, ¶273 of the amended complaint avers that the "rules which require the filing of Forms 10-K and 10-Q with the S.E.C. together with the filing fees, are unconstitutional . . ." Rule 12b-7 is the rule which sets forth the fees which must be paid.

discretion and illegal activities by the S.E.C. and officers thereof. This Count, which "seeks money damages and declaratory relief declaring certain specific acts of the S.E.C. to be and have been unconstitutional and to be and have been arbitrary, capricious, and an abuse of delegated authority," (see ¶276 of the amended complaint), incorporates by reference the earlier paragraphs in the complaint, including paragraphs dealing with the policies of the S.E.C. in suspending trading in securities, as well as specific suspensions of securities (See ¶¶ 60-90, 145-182, 189-190, 193-206, 216-217, 222-229 of the amended complaint).⁵ It then avers that the suspension of each of the 28 securities listed in ¶145 of the amended complaint, in all of which Sloan was a market maker, was "unconstitutional as well as arbitrary, capricious and an abuse of delegated authority" and that Sloan was injured as a result of these suspensions. This count also avers that Sloan was aggrieved by an S.E.C. interpretation of Rule 15c3-1 dated June 8, 1973, which is referred to in ¶227 of the amended complaint, since this interpretation had the effect of limiting the amount of business Sloan could do. Additionally, this count avers that the act by an officer of the S.E.C. of calling Sloan's mother and asking her questions concerning Sloan's financial affairs, as alleged in ¶142 of the amended complaint, as well as other acts amounting to subordination of perjury as alleged in ¶143 of the amended complaint, and still other acts involving the accosting of Sloan's secretary and refusing to permit her to leave his office, as alleged in ¶140 of the amended complaint, deprived Sloan of his right to privacy and other constitutional rights. Count II additionally avers that the

5. It can thus be seen that much of the amended complaint is devoted to setting forth specific facts which purport to demonstrate the unconstitutionality of the power to suspend trading in a security. This is also what the initial complaint dealt with primarily.

activities set forth in ¶¶257-262 of the amended complaint, which alleged that under the pretext of a routine broker dealer inspection, an investigator for the S.E.C. had entered Sloan's office and had required Sloan to produce and provide photocopies of all correspondence exchanged with his attorney as well as copies of all cancelled checks paid to his attorney, violated Sloan's right to enjoy a confidential attorney-client relationship, and that the failure of the S.E.C. to accept broker-dealer filings as alleged in ¶¶ 4, 6, 99, 137, 138, 248 and 253 of the amended complaint as well as the refusal to permit Sloan to withdraw as a broker dealer was arbitrary, capricious, an abuse of delegated authority and unconstitutional.

Count III, with which the opinion of the Court of Appeals does deal, although in a rather cursory fashion, alleges violations of federal antitrust law. This count charges, *inter alia*, the NQB with actual monopolization since it "operates the pink sheets which is a monopoly" and defendants NASD and Bunker Ramo Corp. with making contracts in restraint of trade. The complaint alleges that the NQB at various times has refused to list Sloan's bid and asked and name only quotations in securities in the pink sheets and in addition has imposed a rate structure which places a disproportionate financial burden on the market makers. Sloan's complaint against the NASD alleges that it has entered into a contract with Bunker Ramo Corp. which requires that Bunker Ramo Corp., the owner and operator of the NASDAQ system,⁶ refuse to deal with Sloan by refusing to permit Sloan to subscribe to and make markets on Level III of the NASDAQ system.⁷

6. While this action was pending on appeal Bunker Ramo Corp. sold the NASDAQ system to the NASD.

7. The operations of the NASDAQ system were the subject of the decision in *Shumate & Co., Inc. v. National Association of Securities Dealers, Inc.*, 509 F. 2d 147 (5th Cir. 1975) cert. denied ____ U.S. ____ (Oct. 16, 1975).

Count IV of the amended complaint, which was not discussed in the opinion of the Court of Appeals, alleges a violation of the antifraud provisions of federal securities laws. The District Court characterized this count as "particularly irrational." (App. 17a). This count charges the NASD and Bunker Ramo Corp. with committing acts of fraud "by not permitting Sloan to make markets on NASDAQ, by reducing investor liquidity, by causing the negotiated market system to cease to function, and by charging excessive rates to participants in NASDAQ thereby causing many broker dealers to stop making market[s]." It also accuses the NQB of committing "fraudulent acts by refusing to permit Sloan to list his markets in the pink sheets and the yellow sheets, by rejecting quotation cards unless a Form 211 has been provided, and by cooperating with the S.E.C. in depriving Sloan of his constitutional rights." Finally, this count alleges that the S.E.C. has fraudulently suspended trading in securities and has discouraged brokers and dealers from entering quotations in the pink sheets.

Count V of the amended complaint alleges slander and defamation of character and the unauthorized release of confidential information by the S.E.C.

The ad damnum of the amended complaint demands declaratory relief as well as a judgment in the amount of \$29,600,000.8

As the opinion of the Court of Appeals notes, while the appeal was pending, Sloan & Co's registration as a broker dealer in securities was revoked and Sloan was barred from being associated with any broker or dealer by an ad-

8. This figure is arrived at after trebling the damages in the antitrust count and after other computations which do not present any legal issue relevant to this petition.

ministrative order of the S.E.C., see *Samuel H. Sloan*, Securities Exchange Act, Release No. 11376 (April 28, 1975), 6 SEC Docket 772. Sloan has also been sued twice by the S.E.C. and in the course of the second of these two suits, which is still continuing, the S.E.C. succeeded in having Sloan incarcerated for two days in the Metropolitan Correctional Center in New York City. These events were the subject of a recent Court of Appeals decision which is included as Appendix F to this petition. Sloan is currently attempting to have the administrative order of the S.E.C. set aside and on May 24, 1976 filed a brief in the Court of Appeals which contends, *inter alia*, that the order of the S.E.C. is an unconstitutional bill of attainder under *United States v. Lovett* 328 U.S. 303, 314-318 (1946). The S.E.C. has obtained a total of three months until August 20, 1976 to file its answering brief and the Court of Appeals has ordered that the argument of that proceeding be ready to be heard during the week of September 1, 1976. Sloan is also currently attempting in the Court of Appeals to have three of his appeals from civil injunctions obtained by the S.E.C. reinstated following their dismissal on January 7, 1976. On June 23, 1976, Mr. Justice Marshall extended the time to petition for a writ of certiorari in those three appeals until September 10, 1976.⁹

9. Mr. Justice Marshall did not extend the time to file a petition for a writ of certiorari in the instant case, however, nor was any extension of time requested. The time to petition for a writ of certiorari was extended in cases docketed in the Court of Appeals under numbers 74-1436, 75-7046 and 75-7056. Another petition for a writ of certiorari is currently pending in this Court under docket no. 75-1901 in a case decided as *Sloan v. Canadian Javelin Ltd.*, (2d Cir. Feb. 6, 1976). Still another petition for a writ of certiorari was denied by this court on June 14, 1976 from *Sloan v. S.E.C.* 527 F. 2d 11 (2d Cir. 1975).

REASONS FOR GRANTING THE WRIT

No valid claim could seriously be made that Sloan lacks standing to sue the S.E.C. In addition, although the amended complaint could perhaps have been more artfully pleaded, the Court of Appeals did not find it to be insufficient. Thus, the problems which frequently vex litigants who wish to challenge the constitutional validity of legislative acts do not affect Sloan here. As a result, one of the questions presented in this petition is whether an action which, the Court of Appeals said, "challenges the legality of the entire structure of securities regulation in the United States" can be maintained in the federal courts. This question is one of obvious importance which requires the granting of this petition.

Rule 19(1)(b) of the Supreme Court Rules sets forth reasons which this Court might consider in deciding whether to grant a petition for a writ of certiorari. It is clear that many of these reasons apply here. The opinion of the Court of Appeals, which is devoted primarily to attacking Sloan personally and to making a mockery of his lawsuit, can fairly be said to have "so far departed from the accepted and usual course of judicial proceedings" that for this reason alone this petition should be granted. Moreover, the opinion of the Court of Appeals is in clear conflict with applicable decisions of this court. Under *Goosby v. Osser*, 409 U.S. 512, 518 (1973), the Court of Appeals had no jurisdiction to decide the question of the constitutional validity Exchange Act and the rules promulgated thereunder, and instead was required to remand the action to the district court with instructions to convene a three judge court. This point is also apparent from *Gonzalez v. Automatic Employees Credit Union*, 419 U.S. 90, 100-101 (1974). To be sure, the exception

provided for in *Goosby v. Osser* 409 U.S. at 518 arises where the constitutional attack is "frivolous" which seems to provide the loophole which the Court of Appeals seized upon to permit its decision here. However, decisions of this Court do not permit the term "frivolous" to be applied in an arbitrary manner by a Court of Appeals because "frivolous" has been defined to mean specifically that the argument is foreclosed by analogous Supreme Court decisions. See *Goosby v. Osser, supra* at 518; see also *Sugar v. Curtis Circulation Co.*, 377 F. Supp. 1055, 1061 (S.D.N.Y. 1974) *rev'd sub. nom. Carey v. Sugar* — U.S. —, 47 L. Ed. 2d 587 (March 24, 1976). Here, the Court of Appeals did not and could not have cited analogous Supreme Court cases which foreclose Sloan's constitutional claims for, as Professor Loss has noted, the Supreme Court has never considered the question of the constitutionality of the Exchange Act. See L. Loss, *Securities Regulation* Vol. 1 p. 178 n. 1.10

The only supposedly analogous case which the Court of Appeals was able to cite was *The Moses Taylor* 71 U.S. (4 Wall) 411, 428-430 (1867) and even reliance on that case, which was not cited by any of the parties or by the District Court, was misplaced since it dealt with admiralty law and Article III Section 2 paragraph 1 of the Constitution vests in the federal courts power over "all cases of admiralty and maritime jurisdiction."

This Court's recent decision of *Singleton v. Wulff*, No. 74-1393, decided July 1, 1976, slip op. 12-14 makes it clear that a court of appeals cannot do precisely what the court

10. Naturally, reliance on this authority should not be taken to mean that the petitioner agrees with the conclusion Loss expresses that: "The question of constitutionality of the SEC statutes generally belongs to a bygone day."

of appeals did here. With respect to Sloan's challenge to the constitutionality of §12(g) of the Exchange Act, 15 U.S.C. §78l(g), the district court said that Sloan lacked standing to sue. (App. 13a). The court of appeals apparently reversed on that point and then proceeded to decide that §12(g) was not unconstitutional. See slip op. at 2380 n. 4. This clearly cannot be permitted and again this demonstrates that this petition should be granted.

The opinion of the Court of Appeals is also palpably erroneous in its statements concerning Sloan's allegations that certain defendants violated antitrust law. Sloan's right to maintain this suit is established by *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963). There exists no specific provision of the Exchange Act which could be construed, even by implication, to repeal the antitrust laws.¹¹ Again, the reliance by the Court of Appeals is misplaced. In *Gordon v. New York Stock Exchange*, 422 U.S. 659 (1975) this Court arrived at its decision because of

11. In the District Court, the NASD argued that §15A(n) of the Exchange Act, 15 U.S.C. §78o-3(n), contained an implied repeal of the antitrust laws. However, that section was itself repealed by the Securities Acts Amendments of 1975. Moreover, one of the two Senate reports which explained the reasons for the repeal said that §15A(n) was "superfluous and unnecessary" because of the "prevailing case law interpreting this section," namely *Harwell v. Growth Programs*, 451 F. 2d 240 (5th Cir. 1971), *rehearing denied*, 459 F. 2d 461 (5th Cir. 1972), *cert. denied*, 409 U.S. 876 (1972), and the standards enunciated by the Supreme Court in *Silver v. New York Stock Exchange, supra*, and *Ricci v. Chicago Merchantile Exchange*, 409 U.S. 289 *rehearing denied*, 410 U.S. 960 (1973). See *Report of the Senate Banking Committee*, S. Rep. No. 93-865, 93rd Cong. p. 11 (1974). This report also states unequivocally that "the Committee does not intend thereby to confer general antitrust immunity on the self-regulatory organizations with respect to conduct subject to the S.E.C.'s oversight."

Although the proposed amendments to the Exchange Act failed to pass in 1974, substantially the same bill became the law on June 5, 1975. The Senate Report there stated: "The bill is designed to eliminate all traces of [the S.E.C.'s] inappropriate regulatory interference with legitimate competitive forces." See Senate Report No. 94-75, 94th Cong., 1st Sess. (1975) p. 67.

a specific provision in the Exchange Act which gave the S.E.C. the authority to fix commission rates. 422 U.S. at 685. None of the defendants here pointed to any specific provisions which covered the activities of the various defendants which are alleged in the complaint. In fact, ¶ 191 of the amended complaint alleges, and the NQB admitted in its answer, that the S.E.C. does not have the authority to regulate the NQB.¹² Similarly, the regulatory authority which the court found to be conclusive *United States v. National Association of Securities Dealers, Inc.*, 422 U.S. 694, 732-735 (1975) is not involved here where, for example, the S.E.C. has never expressed an interest in the policies of the NASD regarding whom to admit to the NASDAQ system.

From this it is apparent that the decision of the Court of Appeals is in conflict with a long line of Supreme Court decisions including *Ricci v. Chicago Merchantile Exchange*, 409 U.S. 289, 302-303 n. 13 (1973) which said precisely the contrary of what the District Court said it said. (See App. 16a). In *Federal Maritime Commission v. Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973), this Court reiterated the principle which it has set forth many times when it said "repeals of the antitrust laws by implication

12. However, the Securities Acts Amendments of 1975 subsequently changed that and now the S.E.C. has the authority to promulgate rules which would bring the NQB within its regulatory jurisdiction. Although no such rules have yet been promulgated, there can be no doubt that this new provision of law would have a chilling effect on any desire the NQB might have to act in a manner inconsistent with the express wishes of the S.E.C. This, of course, puts the S.E.C. in the best of all possible worlds and injures Sloan since the S.E.C. has the de facto power to control the actions of the NQB without being required to set forth rules letting the NQB know what it can and cannot do. Sloan is aggrieved by this arrangement because he would like to be able to list securities in the pink sheets freely without having to worry about S.E.C. rules governing the subject and without having to worry about arbitrary and covert S.E.C. actions directed at him personally.

from a regulatory statute are strongly disfavored, and will be found only in cases of plain repugnancy between the antitrust and regulatory provisions." Here, where there are no regulatory provisions, it is obvious that there can be no repeal of federal antitrust laws and therefore the Court of Appeals is in error.

Finally, the decision of the District Court to dismiss those counts of the complaint which were not discussed in the decision of the Court of Appeals is in conflict with decisions of this court in *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Wood v. Strickland*, 420 U.S. 308 (1975); *O'Connor v. Donaldson*, 422 U.S. 563 (1975); *Screws v. United States*, 325 U.S. 91 (1945); *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682 (1949); and *Sloan Shipyards Corp. v. United States Shipping Board Emergency Fleet Corp.*, 258 U.S. 549 (1922). Moreover, since the private party defendants submitted affidavits and exhibits in support of their motions to dismiss, the decision of the District Court is in conflict with this Courts opinion in *Carter v. Stanton*, 405 U.S. 669, 671 (1972) which requires that such a motion be treated as one for summary judgment.

ARGUMENT

It should be noted that the opinion of the Court of Appeals makes a number of unfair, prejudicial and inaccurate statements concerning Sloan personally. For example, it says that Sloan was a "fugitive from justice" although there has yet to be a judicial fact finding that this was the case. Moreover, contrary to the impression left by the decision of the Court of Appeals, there have never been any federal criminal proceedings whatever instituted against Sloan. Additionally, although the S.E.C. has accused Sloan in civil proceedings of violating its rules, the

Court of Appeals, by *sua sponte* and summarily dismissing three Sloan appeals, refused to adjudicate the question of whether this had, in fact, occurred. Also, the decision of the Court of Appeals intimates the view that Sloan is something of a trouble maker for bringing a number of appeals to that court, but, with one exception, all of the cases listed involved action initiated by the S.E.C.¹³ Moreover, the Court of Appeals fails to point out that again with one exception, that being *Sloan v. S.E.C.* 527 F.2d 11 (2d Cir. 1975), all of the cases cited were disposed of by summary order. Thus, what is involved here is a consistant refusal by the Court of Appeals to pass upon a number of substantial legal questions presented by Sloan and not a series of frivolous applications.

In Footnote 5 of its opinion, the Court of Appeals again unfairly criticizes Sloan. It says: "For example, Sloan argues that the S.E.C. 'is a suable entity' and that the district court had jurisdiction while the district court did not mention either problem." Actually, during the oral argument which immediately proceeded the decision of the District Court, the attorney for the S.E.C. argued vigorously that the S.E.C. could not be sued and that the District Court did not have jurisdiction, see Tr. 19-25. The briefs filed by the S.E.C. in the District Court and in the Court of Appeals also advanced both of these arguments. Thus, Sloan was merely responding to what the S.E.C. said.

13. The exception is *Sloan v. Canadian Javelin Ltd.*, Docket No. 75-7096 (2d Cir. Feb. 6, 1976). The case of *Sloan v. Ward*, Docket No. 75-3001 (2d Cir. Jan. 16, 1975) was a petition for a writ of mandamus to the Hon. Robert J. Ward which was filed after Judge Ward arranged to have a civil injunction action which was instituted by the SEC assigned to himself in contravention of Rule 4(A) of the Calendar Rules for the Southern District of New York which provides that "all civil actions and proceedings shall be assigned by lot to one judge for all purposes" and after Judge Ward had entered a "temporary restraining order" which contained a mandatory injunction requiring Sloan to make his books and records "easily accessible" to the S.E.C.

The Court of Appeals further criticizes Sloan for arguing "that certain attorneys should have been disqualified because they were not members of the bar of the Southern District", although the merit of that argument should be obvious,¹⁴ and for arguing and that the Securities Acts Amendments of 1975 require a remand to the District Court, although this Court's decisions in *Bradley v. Richmond School Board*, 416 U.S. 696, 711 (1974) and *Fusari v. Steinberg*, 419 U.S. 379 (1975), which Sloan cited, clearly compel that result.

In conclusion, the Court of Appeals threatens Sloan with double costs and attorneys fees, cf. *Oscar Gruss & Son v. Lumbermans Mutual Casualty Co.*, 422 F.2d 1278, 1284 (2d Cir. 1970),¹⁵ if Sloan bothers them again and thereby rounds out a decision which should be beneath the dignity of a body such as the United States Court of Appeals for the Second Circuit.

It is interesting to observe that although the Court of Appeals criticized Sloan for prosecuting this appeal, it did not, in general, adopt the arguments advanced by the appellees. A total of five briefs were put in by the appellees to this appeal but none of them cited *The Moses Taylor, supra* and only the brief for the NASD cited *United States v. National Association of Securities Dealers, Inc. supra*

14. Sloan also argued that the attorney for the NQB should have been disqualified because he had previously worked for the S.E.C. and had there been in charge of prosecuting Sloan. These arguments, however, are not included in the questions presented in this petition since the immediate concern of the petitioner is to get this case back in court. However, it should be pointed out that Sloan argued that all of the attorneys who filed motions to dismiss were disqualified for one reason or another and had the Court of Appeals agreed with this argument, the order granting the motions to dismiss would have had to be vacated.

15. An examination of the lawback on the original typewritten opinion handed down here shows that the author of this "*per curiam*" opinion also wrote the opinion in *Lumbermens Mutual Casualty Co.*

and *Gordon v New York Stock Exchange, supra*. The reasons for which the NQB and Disclosure, Inc. did not and could not have relied on those two decisions are obvious and, in fact, Sloan relied upon them in his brief.

For that matter, the citation by the Court of Appeals to *The Moses Taylor, supra* was inappropriate. That decision turned upon presence of the word "all" three times in Article III, Section 2, paragraph 1 of the Constitution which, in pertinent part, states:

The judicial power shall extend to *all* cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, . . . to *all* cases of admiralty and maritime jurisdiction, to controversies to which the United States shall be a party . . . " (emphasis supplied)

If the reasoning behind Mr. Justice Field's explanation for his decision in *The Moses Taylor, supra*, 71 U.S. at 429, still holds, the logical result is that one can sue the United States in a state court, because the word "all" is dropped before the word "controversies" in the passage of the Constitution just quoted, whereas if one wants to sue to have a state law declared unconstitutional one must file such a suit in the federal courts. In short, if this logic can be held to apply today, the result would be to uproot a great many Supreme Court decisions including some which are extremely recent.

By now it should be obvious from what has been said that there are a number of things wrong with the decision of the Court of Appeals sought to be reviewed. Many points have been neglected, however, since they cannot be expounded upon within the scope of this petition.¹⁶ Although Sloan

argued in the District Court that the Exchange Act and the rules promulgated thereunder were unconstitutional, controlling decisions of this Court prohibit the Court of Appeals from adjudicating the merits of Sloan's constitutional claims since this is required to be done by a three judge district court in the first instance. The only exception arises when the constitutional questions presented are plainly frivolous which is not the case here. For example, S.E.C. Rules 15c2-11 and 15c3-1 clearly do not meet the constitutional test set forth in *Connally v. General Construction Co.* 269 U.S. 385, 391 (1926) which requires that a statute must not be "so vague that men of common intelligence must necessarily guess at its reasoning and differ as to its application . . ." The existence of scores of attorneys who charge substantial fees for writing opinions on the application of innumerable S.E.C. rules and regulations demonstrates that "men of common intelligence" and even most members of the bar cannot figure out what these rules mean.

It can also be seen that one of the rules involved is invalid on grounds which do not depend upon the resolution of a constitutional question. S.E.C. Rule 15c2-11 was supposedly promulgated under §15(c)(2) or the Exchange Act, 15 U.S.C. §78(c)(2). However, by comparing §15(c)(2) with Rule 15c2-11 one can readily observe that they bear no relation to each other. Consequently, it is obvious that the S.E.C. has bootstrapped itself into taking jurisdiction over an area in which Congress has given it no authority to act.

Many of Sloan's arguments with respect to the constitutionality of the Exchange Act have already been set forth in Sloan's petition for a writ of certiorari in *Sloan v. S.E.C. Docket No. 75-1507 cert. denied June 14, 1976* and

16. Rule 19(l)(h) of the Supreme Court Rules requires a "direct and concise argument."

will not be repeated here.¹⁷ However, there are a number of other arguments which have been presented in this case and not in this Court previously including the argument that under *Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965) the broker dealer registration requirement is unconstitutional and that under *Jones v. S.E.C.*, 298 U.S. 1 (1936), Sloan was deprived of his constitutional right to withdraw as a broker dealer in securities.

In the Court of Appeals, the only time the S.E.C. addressed the merits of Sloan's constitutional arguments was in one sentence on p. 16 of its brief which said:

"Financial responsibility regulations of this kind, designed to protect the public are, of course, common place at both the state and federal levels with respect to financial institutions of all kinds and any discussion of their constitutionality is superfluous."

Actually, in *California Bankers Association v. Schultz*, 416 U.S. 21 (1974), various justices of this Court rendered lengthy opinions which dealt with arguments similar and in some case identical to those advanced by Sloan and arrived at an inconclusive result. This demonstrates that a discussion of Sloan's constitutional arguments would be anything but superfluous. For example, Sloan contends that the broker dealer reports required by Rule 17a-5, 17 CFR §240.17a-5, are unconstitutional under the "required records" standards set forth in such cases as *Shapiro v. United States*, 335 U.S. 1 (1948); *Marchetti v. United States*, 390 U.S. 31, 57 (1968); and *Grosso v.*

17. The Court, of course, intimated no view on the merits by denying Sloan's petition there and if this petition is granted this Court can well consider all the constitutional arguments Sloan has raised.

United States, 390 U.S. 62 (1968); that the unauthorized entries into his office, which are alleged in the complaint, are unconstitutional under *See v. City of Seattle*, 387 U.S. 541, 543 (1967); and that the challenged rules were promulgated by the S.E.C. in an unconstitutional delegation of authority as explained in *Schechter Poultry Co. v. United States*, 295 U.S. 495, 529 (1936); *Panama Refining Co. v. Ryan* 293 U.S. 388, 430 (1935); *National Cable Television v. United States* 415 U.S. 336, 342 (1974); and *Federal Power Commission v. New England Power Co.* 415 U.S. 345, 350 n. 4 (1974). It should be noted that this Court recently expressed agreement with Sloan's views when, in *Ernst & Ernst v. Hochfelder* —U.S.—, 47 L.Ed. 2d 668, 688 (March 30, 1976), it stated:

The rule making power granted to an administrative agency charged with the administration of a federal statute is not the power to make law, rather, it is the power to adopt regulations to carry into effect the will of Congress as expressed by the statute."

With respect to the rules specifically challenged in Sloan's complaint, it is obvious that they are "laws" and that they were not passed by Congress and signed by the President but rather were, in all likelihood, "passed around" and finally "tossed on" a table, indicating approval. See *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 767 (1975) (Blackmun, J., dissenting). Clearly, this is unconstitutional.

It has long been established that an individual such as Sloan has the constitutional right to engage in private enterprise free from unreasonable governmental interference. See *Greene v. McElroy*, 360 U.S. 474, 492 (1959). Although Congress may require a business entity to

keep records and make reports, *United States v. Morton Salt Co.*, 338 U.S. 632, 647-651 (1950), they must be reasonably related to a specific purpose. *Shapiro v. United States*, 335 U.S. 1, 32 (1948); *Yakus v. United States*, 321 U.S. 414, 424 (1944); *United States v. Darby*, 312 U.S. 100, 125 (1941). The S.E.C. has yet to explain what specific purpose is served by the records and reports required by rules 15c2-11 and 17a-5. Moreover, the records and reports required by these rules are not ones that would "customarily" be kept, they do not have a "public aspect" and, since §32 of the Exchange Act, 15 U.S.C. §78ff, provides for criminal penalties, these records and reports do not arise out of an "essentially non-criminal and regulatory area of inquiry." Hence, it is apparent that under *Marchetti v. United States*, 390 U.S. 39, 57 (1968), the rules Sloan is challenging here are unconstitutional. Additionally, in order to be constitutional, the rules must be sufficiently clear as to satisfy the familiar due process requirement of adequate notice, see *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926); *Jordan v. DeGeorge*, 341 U.S. 223, 230 (1951), *rehearing denied*, 341 U.S. 956 (1951); *Bouie v. Columbia*, 378 U.S. 347, 351 (1964), and *Coates v. Cincinnati* 402 U.S. 611, 614 (1971). A reading of the rules themselves reveals that this is not the case.

It should be noted that at least one aspect of the regulatory scheme which the Court of Appeals held to give the NASD and others an implied immunity from antitrust liability is unconstitutional under analogous case law. Senate Report No. 94-75, 94th Cong., 1st Sess., explains that provisions of the Securities Acts Amendments of 1975 transform the NASD from a trade association into a de facto branch of the federal government. It was expressly held in *Schechter Poultry Co. v. United States*, 295 U.S.

495, 537 (1936) that such an arrangement is unconstitutional.

Although the incorrectness of the decision of the Court of Appeals has by now been amply demonstrated, something should be said about the arguments advanced by the appellees in the Court of Appeals. To begin with, the Court of Appeals ignored almost everything the appellees said or else decided that these arguments had no merit. It has already been pointed out that the S.E.C. argued that the S.E.C. cannot be sued and that a district court has no jurisdiction over the S.E.C. Similarly, a plethora of arguments were advanced by the other appellees. However, these arguments will not be discussed here since they form no apparent basis for the decision of the Court of Appeals and since, if the appellees wish to press their arguments here, they must file a cross petition for a writ of certiorari. See *United States v. Reliable Transfer Co.* 421 U.S. 397, 401 n. 2 (1975).

However, some discussion should be made of Sloan's case against defendants National Clearing Corp. and Disclosure, Inc. Sloan complains that the National Clearing Corp. did not permit him to join. See ¶ 44 of the amended complaint. The National Clearing Corp. is a wholly owned subsidiary of the NASD, see ¶ 47, and claimed antitrust immunity similar to that claimed by the NASD. Since there is no rule subject to S.E.C. approval which governs the activities of the National Clearing Corp. which are alleged here, it is obvious that there is and can be no implied or actual repeal of the antitrust laws and hence the Court of Appeals is wrong.

Disclosure, Inc. is in a different position from the other defendants. Disclosure, Inc. is a subsidiary of Reliance Group, Inc. and was set up for the purpose monopolizing

the business of reproducing for sale to the public copies of all documents filed with the S.E.C. This is a sizable business since more than 100,000,000 pages of documents are sold annually to the public by Disclosure, Inc. See Address by Ray Garrett Jr., Chairman of the Securities and Exchange Commission, to the Society of Business Writers, May 6, 1975 p. 4.

The District Court *sua sponte* dismissed Sloan's complaint against Disclosure, Inc., stating that it was "frivolous", apparently because the rate charged by Disclosure, Inc. is 15 cents per page. (App. 19a). There is no authority which gives a district court the arbitrary power to dismiss an action *sua sponte* in the manner it did here and consequently this decision must be reversed.

On appeal, Disclosure, Inc. said that it had entered into a contract with the S.E.C. pursuant to the provisions of 41 U.S.C. §252(c)(10). It should be obvious, however, that this provision applies to situations where an agency of the government purchases property or services from a private enterprise. This statute clearly does not give an agency such as the S.E.C. the authority to create a monopoly and to grant to a private enterprise the exclusive right to sell copies of documents filed with the S.E.C. to the public. It is clear, therefore, that Disclosure's contract with the S.E.C. is legally involved and that Disclosure is not immune from antitrust liability. Therefore, the decision of the Court of Appeals should be reversed.

CONCLUSION

For all of the reasons set forth above this petition for a writ of certiorari should be granted.

Dated: July 14, 1976

Respectfully submitted,

SAMUEL H. SLOAN
Petitioner, pro se
917 Old Trents Ferry Rd.
Lynchburg, Va. 24503

Appendix

APPENDIX A
OPINION OF THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT DATED
MARCH 4, 1976

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 569—September Term, 1975.

(Argued February 19, 1976 Decided March 4, 1976.)

Docket No. 75-7283

SAMUEL H. SLOAN, SAMUEL H. SLOAN & Co.,

Plaintiffs-Appellants,

—against—

SECURITIES AND EXCHANGE COMMISSION, et al.,

Defendants-Appellees.

Before:

FEINBERG, OAKES and VAN GRAAFEILAND,

Circuit Judges.

Appeal from dismissal by United States District Court for the Southern District of New York, Thomas P. Griesa, *J.*, of complaint charging SEC and various others with numerous violations of the Constitution, the antitrust laws and other provisions of law.

Affirmed.

SAMUEL H. SLOAN, Pro Se, Lynchburg, Virginia,
for Appellants.

MICHAEL J. STEWART, Assistant General Counsel, Securities and Exchange Commission, Washington, D.C. (David Ferber, Solicitor;

Thomas L. Taylor III, Attorney, on the brief), *for Securities and Exchange Commission.*

NAOMI REICE BUCHWALD, Assistant United States Attorney (Thomas J. Cahill, United States Attorney for the Southern District of New York; Steven J. Glassman, Assistant United States Attorney, on the brief), *for United States of America.*

REX W. MIXON, JR., New York, N.Y. (Rogers & Wells, William F. Koegel, on the brief), *for National Quotation Bureau, Inc.*

ROBERT J. WOLDOW, Washington, D.C. (Jeffrey M. Silow, National Clearing Corporation; Lloyd J. Derrickson, National Association of Securities Dealers, Inc., Washington, D.C.; Breed, Abbott & Morgan, C. MacNeil Mitchell, New York, N.Y., on the brief), *for National Association of Securities Dealers, Inc., Bunker Ramo Corporation and National Clearing Corporation.*

PATRICIA ANNE WILLIAMS, New York, N.Y. (Willkie Farr & Gallagher, Michael B. Targoff, on the brief), *for Disclosure Inc.*

PER CURIAM:

Samuel H. Sloan appeals from a decision of the United States District Court for the Southern District of New York, Thomas P. Griesa, *J.*, dismissing his *pro se* complaint, which charged appellees with various violations

of the Constitution and the antitrust and securities laws, as well as with several common law torts.¹

Sloan, a securities broker-dealer, has had more than his share of litigation in this court. In January 1974, he was found to have violated rules of the Securities and Exchange Commission (SEC) relating to record-keeping and net capital, and was enjoined from further violations. *SEC v. Sloan*, 369 F. Supp. 996 (S.D.N.Y. 1974). His appeal from this order was dismissed by this court, *SEC v. Sloan*, Dkt. No. 74-1436 (2d Cir. Jan. 7, 1976), because Sloan was a fugitive from justice when the case came on to be heard, having apparently fled the jurisdiction to escape sentencing for contempt of a preliminary injunction restraining still further violations of SEC rules and requiring Sloan to permit SEC examination of his books and records. An appeal from this injunction was dismissed on the same day and on the same ground. *SEC v. Sloan*, Dkt. No. 75-7056 (2d Cir. Jan. 7, 1976).² Sloan's registration as a broker-dealer has been revoked by the SEC and he has been barred from association with any broker or dealer, Samuel H. Sloan, Securities Exchange Act Release No. 11376 (April 28, 1975), appeal docketed, *Sloan v. SEC*, Dkt. No. 75-4087, 2d Cir., May 7, 1975.³

1 For simplicity, we have treated Samuel H. Sloan and Samuel H. Sloan & Co. as one plaintiff and one appellant. Appellees, in addition to the Securities and Exchange Commission, are the United States of America, National Quotation Bureau, Inc., Bunker Ramo Corporation, National Association of Securities Dealers, Inc., Disclosure Inc., and National Clearing Corporation.

2 A third Sloan appeal was also dismissed on that day, *SEC v. Canadian Javelin, Ltd.*, Dkt. No. 75-7046 (2d Cir. Jan. 7, 1976).

3 For other decisions arising out of Sloan's operations as a broker-dealer and the SEC's efforts to prevent his violations of its rules, see *Sloan v. Canadian Javelin, Ltd.*, Dkt. No. 75-7096 (2d Cir. Feb. 6, 1976); *Sloan v. SEC*, slip op. 213 (2d Cir. Oct. 15, 1975); *Sloan v. SEC*, Dkt. No. 75-4087 (2d Cir. June 12, 1975); *Sloan v. Ward*, Dkt. No. 75-3001 (2d Cir. Jan. 16, 1975).

In this action, Sloan mounts a massive though diffuse attack on the SEC and various private agencies in the securities industry. In effect, he challenges the legality of the entire structure of securities regulation in the United States. We agree with Judge Griesa that the attack is frivolous.

Count I of Sloan's lengthy complaint challenges the constitutionality of the Securities Exchange Act of 1934 and the rules and regulations promulgated under it. Sloan argues that the Act and rules constitute an unconstitutional delegation of legislative power; are overly vague; deprive him of liberty and property without due process of law; violate his right to contract; and exceed congressional power under the commerce clause. Some of these constitutional attacks on the authority of the SEC were raised by Sloan in this court on a previous occasion, and we then characterized his "blunderbuss attack" as "frivolous." *Sloan v. SEC*, slip op. 213, 215 (2d Cir. Oct. 15, 1975). We adhere to that view.

Count I also attacks a number of specific provisions of the regulatory scheme. For example, it charges that section 27 of the Act, 15 U.S.C. § 78aa, which vests in the federal courts exclusive jurisdiction of actions brought under the Act, is an unconstitutional interference with the jurisdiction of the state courts. But it has been established at least since *The Moses Taylor*, 71 U.S. (4 Wall) 411, 428-30 (1867), that Congress has the power to make federal jurisdiction exclusive. The other provisions of the Act and rules challenged by Sloan⁴ are valid and reasonable exercises of congressional power under the commerce clause and the SEC's delegated regulatory power, which infringe no constitutional rights of plaintiff.

⁴ Sections 12(g), 15(e)(5), 19(a)(4) of the Act, 15 U.S.C. §§ 78l(g), 78o(e)(5), 78s(a)(4), and Rules 15c2-11, 15c3-1, 17a-5, 17 C.F.R. §§ 240.15c2-11, 240.15c3-1, 240.17a-5.

The other main branch of Sloan's complaint is Count III, which charges the various non-governmental defendants with violations of the Sherman and Clayton Acts. But none of the actions charged constitute antitrust violations, essentially because they were taken pursuant to the scheme of securities regulation established by the Securities Exchange Act of 1934. See generally *United States v. National Association of Securities Dealers, Inc.*, 422 U.S. 694 (1975); *Gordon v. New York Stock Exchange*, 422 U.S. 659 (1975).

We have also considered the other charges contained in the complaint and the various assignments of error made by Sloan on appeal,⁵ and find no error in the dismissal of the complaint.

While we do not in this case invoke the provisions of Fed. R. App. P. 38 to assess penalties against appellant, we note that these are available, and may be appropriate if the same arguments which we have dismissed as frivolous are put before us again in the future.

The judgment of the district court is affirmed.

⁵ Many of the points made in Sloan's brief bear little relation to the decision appealed from. For example, Sloan argues that the SEC "is a suable entity" and that the district court had jurisdiction, while the district court did not mention either problem. Sloan also argues, among other things, that a default judgment should have been entered against the United States, that certain attorneys should have been disqualified because they were not members of the bar of the Southern District, that the Securities Acts Amendments of 1975 require vacation of the judgment below, and that the district court erred in not entering a preliminary injunction. None of these arguments has merit.

APPENDIX B**ORDER DATED APRIL 16, 1976 AMENDING THE OPINION OF MARCH 4, 1976 AND DENYING THE PETITION FOR A REHEARING****UNITED STATES COURT OF APPEALS
For the Second Circuit**

No. 75-7283

SAMUEL H. SLOAN, SAMUEL H. SLOAN & CO.,
*Plaintiffs-Appellants.***-against-****SECURITIES AND EXCHANGE COMMISSION, et al.,**
Defendants-Appellees.

Upon the petition of plaintiffs-appellants for rehearing, it is hereby ordered that:

1. The petition for rehearing is denied.
2. The opinion is amended as follows:

(a) At *slip op.* 2379, at the end of line 11, insert a new footnote 1a. That footnote will read as follows:

In dismissing the appeal, the court cited *United States v. Sperling*, 506 F.2d 1323, 1345 n.33 (2d Cir. 1974), cert. denied, 420 U.S. 962 (1975).

(b) At *slip op.* 2380, footnote 4:

(i) Insert before the present text of the footnote, the following:

At the time the complaint was filed, before the

Securities Acts Amendments of 1975, these were and make the initial "s" in "Sections" lower case.

(ii) At the end of the footnote, insert the following:

Former section 15(c)(5) is now section 12(k), 15 U.S.C. §78l(k), and former section 19(a)(4) has been repealed.

s/ Wilfred Feinberg

s/ James L. Oakes

s/ Ellsworth Van Graafeiland
U.S.C.J.J.

April 16, 1976

APPENDIX C

ORDER DATED APRIL 16, 1976 DENYING THE SUGGESTION THAT THE REHEARING BE IN BANC

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the sixteenth day of April, one thousand nine hundred and seventy-six.

SAMUEL H. SLOAN, et al,
Plaintiffs-Appellants.

v

SECURITIES & EXCHANGE COMMISSION, et al,
Defendants-Appellees.

75-7283

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

s/ Irving R. Kaufman
IRVING R. KAUFMAN
Chief Judge

APPENDIX D

ORAL DECISION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK RENDERED ON FEBRUARY 14, 1975

(THOMAS P. GRIESA, D.J.)

This is an action by Samuel H. Sloan and Samuel H. Sloan and Co., a sole proprietorship, against the SEC, the National Quotation Bureau, Inc., the National Association of Securities Dealers, Inc., Bunker Ramo Corporation, National Clearing Corporation and an entity named as Disclosure Inc.

The caption also names as a defendant the United States of America as the Securities and Exchange Commission, although it appears that the United States of America has not been served.

The complaint originally filed in this action was dismissed by me on September 18, 1974, with leave to replead. An amended complaint was subsequently filed and there are numerous motions addressed to it now.

Let me briefly summarize the motions.

On January 10, 1975, I signed an order to show cause for the plaintiff, bringing on an application by the plaintiff for a preliminary injunction to require the National Quotation Bureau to list plaintiff in the so-called pink sheets and yellow sheets.

On January 31, 1975, the SEC filed a motion to dismiss the amended complaint. On the same date, the National Association of Securities Dealers, Bunker Ramo Corporation and National Clearing Corporation, filed a motion to dismiss the complaint.

On February 3, 1975, the National Quotation Bureau,

Inc., filed a motion to dismiss the complaint.

On February 5, 1975, the plaintiff filed a motion seeking three forms of relief: First, the plaintiff sought a preliminary and permanent injunction enjoining the SEC from instituting and prosecuting actions for injunctive relief, from promulgating and enforcing rules and regulations, from conducting investigations and from undertaking any acts or practices under color of the Securities Exchange Act of 1934 or rules or regulations promulgated thereunder. The asserted ground for this broad request for relief was that the existence of the Securities and Exchange Commission is repugnant to the constitution.

Second, plaintiff asked summary judgment on the amended complaint.

Third, plaintiff requested the convening of a three-judge court.

On February 7, 1975, the plaintiff filed a motion to disqualify certain persons—Dennis C. Hensley, Lloyd J. Derrickson and Robert Waldow—from acting as attorneys for Bunker Ramo Corporation, National Association of Securities Dealers and National Clearing Corporation.

There was also a request to disqualify George W. Brandt, Jr. as acting as counsel for National Quotation Bureau.

There was also a request for an order directing the office of the United States Attorney to appear on behalf of the United States of America or for a default judgment against the United States.

On February 13, 1975, the plaintiff filed a motion to disqualify Thomas L. Taylor, III, from appearing as counsel for the Securities and Exchange Commission.

I am denying the plaintiffs' applications in toto and I am granting the motions of the SEC, National Association of Securities Dealers, National Clearing Corporation, Bunker Ramo and National Quotation Bureau to dismiss the complaint.

After I get through stating my decision and reasons on the above motions, I will deal with the posture of Disclosure Inc., as to whom there is no formal motion before me at this time.

The basic thrust of the action is that plaintiff challenges the constitutionality of the Securities Exchange Act of 1934, challenges the existence of the Securities and Exchange Commission and the constitutionality of all rules and regulations promulgated by that body.

The plaintiff is engaged in combat with the SEC, which has taken a number of channels, of which this action is only one.

As we have discussed this afternoon, the SEC is engaged in an administrative proceeding against plaintiff Sloan and his company to revoke his broker-dealer registration. Although the papers are not here, it is represented to me that the claim is that the plaintiff has violated the net capital requirements of SEC Rule 15c3-1, and that he has also violated the informational requirements of Rules 17a-3, 17a-4 and 17a-5.

The SEC has also sued Sloan and Company in an action which was assigned to Judge Ward of this court and in which a permanent injunction was entered, requiring plaintiff to desist from acting as a broker-dealer in violation of Rules 17a-3, 17a-4 and 15c3-1. The number of the case is 71 Civil 2695, and is reported as *SEC v. Sloan et al.*, 369 Fed. Supplement 996 (SDNY 1974).

I am advised that Sloan has appealed from the administrative judge's initial decision in the SEC proceeding revoking his broker-dealer registration and that he has also appealed from the permanent injunction granted by Judge Ward in the case in this court.

There is a second action before Judge Ward now pending which involves questions of violations of Rules 17a-4 and 15c2-11, the latter dealing with the making of quotations. There a preliminary injunction has been entered against plaintiff.

As I indicated, the basic claim in the case before me is that the Securities Exchange Act of 1934 and the SEC rules issued thereunder are unconstitutional. The claim is that there is an unconstitutional delegation of power to the SEC and that the Exchange Act and Rules are unconstitutionally vague and deprive the plaintiff of liberty and property without due process of law and violate his right to contract.

There are specific attacks made upon specific provisions of the statute and specific SEC rules. Particularly, it is claimed that the statutory provisions of the 1934 Act providing for suspension by the SEC of trading in securities are unconstitutional. These sections are 15(c)5 and 19(a)4, which give the Securities and Exchange Commission the authority to suspend the trading in a security for a period not exceeding 10 days, if such suspension in the opinion of the Commission is in the public interest and the protection of investors so requires. There is also an attack upon Section 12(g) of the 1934 Act and the rules thereunder for filing Form 10-K and other forms with the SEC.

Three SEC rules are also specifically attacked in the action, that is Rule 17a-5, which I referred to earlier, Rule 15c2-11, and Rule 15c3-1. Rule 17a-5 provides for the

filings of certain financial statements by broker-dealers and Rule 15c2-11 places certain conditions on the ability of a broker-dealer to publish a quotation for a security, that is, before a quotation can be published by a broker-dealer, the issuer of the security must have on file the necessary registration statement and so forth. Rule 15c3-1 is the net capital rule.

As far as the general attack upon the Exchange Act of 1934 and the general attack upon the existence of the SEC and the ability of the SEC to promulgate rules and regulations regarding the securities business, the matter has been for so long and so conclusively established against the plaintiff's position that further discussion is unnecessary.

With regard to the specific statutory sections and specific SEC rules referred to in this action, some further brief mention is necessary. These are Sections 15(c)(5) and 19(a)(4) and 12(g) and Rules 15c2-11, 15c3-1 and 17a-5. No cogent reason has even been suggested for the invalidity of these provisions. As already indicated, the arguments about improper delegation of power to the SEC are long since foreclosed. The arguments about unconstitutional vagueness are patently frivolous in the case of the rules referred to, and, in the case of the suspension of trading sections of the statute, are foreclosed by analogous case law. *Wright v. SEC*, 112 F. 2d 89, 94-95 (2d Cir. 1940), and *American Sumatra Tobacco Corp. v. S.E.C.*, 110 F. 2d 117 (D.C. Cir. 1940). Plaintiff, not being an issuer of securities has no standing to attack Exchange Act 12(g) or the rules thereunder.

Certain other elements of the action do require discussion, and for this purpose a brief factual introduction is required.

Plaintiff apparently is suing in this action primarily as a market-maker for over-the-counter stocks. Although his complaint is long and contains much irrelevant matter, it seems to me that the basic thrust of the complaint can be summarized as follows:

He complains that as a market-maker he is impaired because he is not able to participate in bidding on the electronic bidding process provided for by what is known as NASDAQ.

To back up a moment, one of the defendants is the well known NASD, which is an association of securities dealers who trade in over-the-counter stocks, and this association exists under the authority of Section 15A of the Exchange Act of 1934.

Section 15A is the so-called Maloney Act. In order to provide for the handling of quotations and bidding between the dealers, by use of electronic technology, the NASD has contracted with defendant Bunker Ramo to set up the system known as the NASDAQ.

Under the applicable rules, the only people who can participate on the NASDAQ in the sense of bidding through this device are members of the NASD. The plaintiff is not a member of the NASD. It is stated in the complaint that he does not want to become a member of the NASD and the reason he does not want to do this is because he objects to the requirement of the NASD that its members agree to arbitration of disputes among themselves and with customers.

Another complaint which the plaintiff has about the NASDAQ is that it is too expensive for smaller traders such as himself. Here he makes an antitrust claim against Bunker Ramo and the NASD, claiming price fixing and monopolization.

Another basic branch of the plaintiff's complaint is the claim that he has lost in various ways because many of the stocks in which he has been a market-maker or been otherwise interested, many of these stocks have been suspended from trading by the SEC under the statutory provisions which I have referred to earlier.

Another phase of the complaint is a claim against the National Quotation Bureau. The National Quotation Bureau is basically a publication service which puts out the so-called pink sheets and yellow sheets which contain quotations for over-the-counter stocks and bonds. This was the system which was apparently universally relied on in the over-the-counter market prior to the time when the electronic bidding process of the NASDAQ came into being. Apparently there are still some securities which are referred to in the pink or yellow sheets which are not carried on the electronic device. In any event, since plaintiff is not a bidder on the electronic device, he seeks to use the pink sheets and he claims that he has a grievance against the Quotation Bureau respecting the pink sheets. He claims that he was kept off of the pink sheets for a time for failure to pay a bill of \$1700 to the National Quotation Bureau, but concedes that subsequently he was reinstated in the pink sheets upon payment of the amount due.

He has a current problem about the pink sheets because Judge Ward in a current litigation against plaintiff has preliminarily enjoined plaintiff from making quotations under certain circumstances and this prevents the plaintiff from utilizing the pink sheets for quotations.

Plaintiff concedes that he is now restrained by Judge Ward's order from initiating over-the-counter quotations on the pink sheets, but he claims the right to have particular securities and his name listed on the pink sheets without quotations.

In addition to the above claims which I have discussed, plaintiff lists a number of specific grievances alleged against the SEC.

For instance, it is claimed that the SEC or investigators for the SEC questioned the plaintiff's secretary, the plaintiff's mother, and a former employee of the plaintiff.

None of these claims are sufficient, and the complaint must be dismissed.

The claim against the NASD and Bunker Ramo regarding the NASDAQ is legally invalid.

From the allegations in the complaint and the other papers before me, it appears clear that what plaintiff is complaining about regarding the requirements for participation in the NASDAQ and the fixing of charges for the usage of the NASDAQ are matters stemming from NASD rules and regulations promulgated under the Maloney Act.

There is a specific provision for challenging such rules and regulations by resort to the SEC and by further resort to the Court of Appeals. Exchange Act, Section 15A(a) et seq; Section 15A(k), Section 25.

If plaintiff indeed has a valid claim on these matters, his remedy is with the SEC and in the Court of Appeals. In such a proceeding, the SEC and the Court of Appeals would be empowered to take competitive considerations, among other things, into account. Exchange Act Section 15A(b)(8). Antitrust claims of the kind brought by plaintiff will not lie, Exchange Act Section 15A(n). See also *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289, 302-303, note 13 (1973).

The claim for losses from suspension of trading is covered by my earlier discussion as to the validity of the statutory provisions governing such suspension. There is

nothing from which a case could be made out that the SEC's actions were not within the statutory authorization. Indeed it is alleged that in most cases the SEC suspends trading of securities because of the failure of the issuer to file and keep the necessary financial records.

The claim relating to the National Quotation Bureau is patently frivolous. There was a temporary inability to participate on the pink sheets because of non-payment of bills. Apparently the bills were paid. The only claim currently pending or currently made in this action is the refusal of the Quotation Bureau to carry lists of securities and carry plaintiff's name without the quotations. There is no merit whatsoever in such a claim.

With regard to the various allegations about SEC investigative activities, etc., these are little more than narrative coloration. They offer nothing sufficient in the way of allegations of wrongdoing, or resultant injury to plaintiff.

One further matter which should be covered relates to the defendant National Clearing Corporation. The National Clearing Corporation is a body set up under auspices of the NASD to efficiently handle the clearing of securities transactions in over-the-counter securities. It appears that plaintiff is not a member of the NCC because he is not a member NASD and that NASD membership is indeed required for participation and membership in the NCC. Again, this is a matter of NASD rules and if the plaintiff wants to challenge those rules, his remedy is with the SEC and in the Court of Appeals, not in an action in this court.

I should also note that Count IV of the complaint asserts a particularly irrational claim against certain defendants under Section 10(b) of the 1934 Act and Rule 10b-5. This merits no discussion.

Now, I think that disposes of all the motions that I have referred to and that leaves only the status of Disclosure, Inc.

What do we do about them?

MS. WILLIAMS: Your Honor, Disclosure, Inc. is sued in this matter as a sort of a tag-along party. We are named in precisely six paragraphs of the 309 in the complaint, four of which are the only ones which could be deemed to be concerned with substantive allegations.

We are sued under Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act.

THE COURT: What is Disclosure, Inc.

MS. WILLIAMS: Disclosure, Inc. is a private corporation which performs duplicating services of various and sundry documents.

THE COURT: For whom?

MS. WILLIAMS: For the public as well as for the SEC. It holds a contract.

THE COURT: Am I correct, if you want to get documents on file with the SEC, you apply to the SEC and then Disclosure, Inc. does the work; they do the duplicating?

MS. WILLIAMS: Disclosure, Inc. will do duplicating and the SEC also itself provides machines in its offices, public machines for duplicating materials.

THE COURT: Where are you referred to in the complaint?

MS. WILLIAMS: Paragraphs 11, 213 through 215, 290 and 297. The substantive paragraphs are 213 through 215 and initial paragraph 11. They are on pages 27, 28, 36, 38 and page 3.

THE COURT: Is it a claim of excessive rate?

MS. WILLIAMS: Yes, sir.

THE COURT: What is the rate?

MS. WILLIAMS: 15 cents per page.

THE COURT: That's frivolous. I'm simply going to dismiss it.

All right. Thank you very much.

MR. SLOAN: Your Honor, there was one motion, my motion for disqualification of Mr. Taylor, not being a member of the bar of this court.

THE COURT: I have denied all of those disqualification motions. There is no discussion necessary. Those are absolutely frivolous.

I wish to make it clear that I am dismissing this complaint without leave to replead. There has been one opportunity to replead and no further opportunity will be granted.

All motions will be endorsed in accordance with this decision.

I hereby certify that the foregoing is a true and accurate transcript, to the best of my skill and ability, from my stenographic notes of this proceeding.

s/ John H. Kruppel
Official Court Reporter
U.S. District Court

APPENDIX E

**JUDGMENT ENTERED BY THE CLERK OF THE
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK ON
FEBRUARY 26, 1975**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SAMUEL H. SLOAN

-against-

SECURITIES AND EXCHANGE COMMISSION
UNITED STATES OF AMERICA as the
SECURITIES & EXCHANGE COMMISSION
NATIONAL QUOTATION BUREAU, INC. 74 Civil 2792
BUNKER RAMO CORP.
NATIONAL ASSOCIATION OF
SECURITIES
DEALERS INC.
DISCLOSURE, INC.
NATIONAL CLEARING CORP.

JUDGMENT

The defendant Securities and Exchange Commission having moved the Court to dismiss the action against it for lack of jurisdiction and for failure to state claim upon which relief can be granted pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, and the said motion having come on to be heard before the Honorable Thomas P. Griesa, United States District Judge, and the Court thereafter on February 24, 1975, having handed down its memorandum granting the said motion as to all defendants, it is,

ORDERED, ADJUDGED and DECREED: that defendants SECURITIES EXCHANGE COMMISSION, et al., have judgment against SAMUEL H. SLOAN, dismissing the complaint without leave to replead.

Dated: New York, N.Y.

February 26, 1975.

s/ Raymond Burghardt
Clerk

APPENDIX F

**OPINION DATED MAY 10, 1976 OF THE UNITED
STATES COURT OF APPEALS FOR THE SECOND
CIRCUIT IN A RELATED CASE**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 776—September Term, 1975.

(Argued April 27, 1976

Decided May 10, 1976.)

Docket No. 75-6106

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

—against—

SAMUEL H. SLOAN, individually and d/b/a
SAMUEL H. SLOAN & Co.,

Defendants-Appellants.

Before:

LUMBARD, WATERMAN and FEINBERG,
Circuit Judges.

Appeal from various orders of United States District Court for the Southern District of New York, Robert J. Ward, *J.*, entered in course of suit to enjoin violations of SEC rules.

Affirmed in part, dismissed in part.

SAMUEL H. SLOAN, Pro Se, Lynchburg, Virginia,
for Defendants-Appellants.

MICHAEL J. STEWART, Assistant General Counsel, Securities and Exchange Commission, Washington, D.C. (Thomas L. Taylor, III, Attorney, on the brief), *for Plaintiff-Appellee.*

PER CURIAM:

Samuel Sloan, a securities broker-dealer who is a frequent litigant in this court, see *Sloan v. SEC*, slip op. 2377, 2379 & nn. 2, 3 (2d Cir. March 4, 1976), and cases there cited, appeals from a number of orders of the United States District Court for the Southern District of New York, Robert J. Ward, *J.*, entered in the course of a continuing lawsuit in which the Securities and Exchange Commission (SEC) seeks to enjoin him from violation of various SEC rules requiring maintenance of proper books and records and making them accessible for inspection by SEC officials.¹ We affirm in part and dismiss in part.

The most significant order challenged by Sloan on this appeal, to which he devotes most of his lengthy brief, is an order dated September 3, 1975 holding him in civil contempt for failing to comply with a preliminary injunction granted by Judge Ward on January 17, 1975.² The injunction required Sloan, among other things, "to permit immediate examination in an easily accessible place by examiners and other representatives of the Commission of [his] books and records." An appeal from this

1 This is not the first such action taken by the SEC against Sloan. See *SEC v. Sloan*, 369 F. Supp. 996 (S.D.N.Y. 1974), appeal dismissed, Dkt. No. 74-1436 (2d Cir. Jan. 7, 1976).

2 The September 3 order adjudged Sloan in civil contempt and gave him 20 days to purge himself. When he did not, a further order of civil contempt was entered on September 26, 1975 ordering Sloan's arrest.

injunction was dismissed by this court on January 7, 1976. *SEC v. Sloan*, Dkt. No. 75-7056.³

The order from which Sloan now seeks to appeal is both in form and in substance an order of civil contempt. An order of civil contempt against a party to the litigation is not an appealable final order. 9 Moore, Federal Practice ¶ 110.13[4]. Moreover, after filing and briefing this appeal, Sloan purged himself of contempt, and on February 4, 1976, Judge Ward entered an order to this effect. Thus, no live controversy remains as to any of the alleged errors in the contempt adjudication, and the appeal from the order of contempt is moot.

Sloan also argues that the district court's refusal to dismiss the SEC's complaint on various grounds, and the grant to the SEC of a protective order as to certain interrogatories, were erroneous. Neither is an appealable final order. 9 Moore, Federal Practice ¶ 110.08[1] at n.33 and cases there cited; *UAW v. National Caucus of Labor Committees*, 525 F.2d 323, 324 (2d Cir. 1975), and cases there cited. Moreover, Sloan's notice of appeal does not refer to the protective order, dated August 4, 1975. These aspects of the appeal are therefore dismissed for lack of jurisdiction.

Another ruling appealed from is Judge Ward's refusal to hold the SEC in contempt for allegedly violating an oral order restricting the parties' press releases. Assuming that such an order is appealable at all, we note that the district judge found that the particular press release that was the subject of Sloan's motion did not violate his order. We see no basis for substituting our judgment for that of the district judge in interpreting his own order.

³ We cited *United States v. Sperling*, 506 F.2d 1323, 1345 n.33 (2d Cir. 1974), cert. denied, 420 U.S. 962 (1975).

We also affirm Judge Ward's refusal to disqualify and disbar counsel for the SEC. While such an order is appealable, *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 496 F.2d 800 (2d Cir. 1974) (en banc), we have held that the supervision of attorneys is a matter primarily for the district court, whose findings will be upset only on a showing of abuse of discretion. *Hull v. Celanese Corp.*, 513 F.2d 568, 571 (2d Cir. 1975). We see no abuse of discretion here. Sloan also argues that the SEC attorneys should be disqualified because the SEC lacks authority to prosecute actions on its own behalf, and that *SEC v. Robert Collier & Co.*, 76 F.2d 939 (2d Cir. 1935), which holds that it has such authority, should be overruled. We see no sufficient reason to overturn a persuasive decision by a distinguished bench.

Finally, Sloan appeals from the denial of his motion to enjoin the SEC from "harrassment and annoyance of the defendant herein." Sloan apparently would have us treat this motion as in effect a complaint or counterclaim charging violations of his constitutional rights, and seeking a preliminary injunction. On that theory, the order denying the injunction would be appealable. 28 U.S.C. § 1292(a)(1). Moreover, such a denial would have required findings of fact and conclusions of law under F.R. Civ. P. 52(a), which were not made by the district court. On the other hand, the papers do not purport to be pleadings, and in the circumstances of this litigation, the district judge apparently considered the motion as one addressed to "the district court's power to control the proceedings before it," 9 Moore, Federal Practice ¶ 110.19[1] at 207-08, and thus not a request for an injunction governed by the Rule and statute cited above. We agree that the motion here was more in the nature of a request for a protective order.

The order denying it is therefore interlocutory and non-appealable.

Accordingly, as indicated above, the appeal is dismissed as to certain of the rulings appealed from; in all other respects, the rulings of the district court are affirmed.

SEP 14 1976

No. 76-58

EDWARD R. BROWN, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

SAMUEL H. SLOAN, SAMUEL H. SLOAN & CO.,
PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE
SECURITIES AND EXCHANGE COMMISSION
IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

DAVID FERBER,
Solicitor to the Commission,

FREDERICK B. WADE,
Attorney,
Securities and Exchange Commission,
Washington, D. C. 20549.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes and rules involved	2
Statement	2
Argument	8
Conclusion	10
Appendix A	1a
Appendix B	3a

CITATIONS

Cases:

<i>Bell v. Hood</i> , 327 U.S. 678	9
<i>Goosby v. Osser</i> , 409 U.S. 512	9
<i>Hagans v. Lavine</i> , 415 U.S. 528	9
<i>Holmes v. Eddy</i> , 341 F. 2d 477	9
<i>National Labor Relations Board v. Nash-Finch Co.</i> , 404 U.S. 138	9

Constitution, statutes and rules:

United States Constitution:

Article I, Section 1	5
Fourteenth Amendment	5

Securities Exchange Act of 1934, 48 Stat. 881, as amended, 15 U.S.C. 78a, *et seq.*:

Section 10(b), 15 U.S.C. 78l(g)	6
Section 12(g), 15 U.S.C. 78j(b)	7

Constitution, statutes and rules—Continued	Page
Section 15(b)(5), 15 U.S.C. 78o(b)(5)	3
Section 15(b)(7), 15 U.S.C. 78o(b)(7)	3
Section 15(c)(2), 15 U.S.C. 78o(c)(2)	4, 9, 1a
Section 15(c)(2), 15 U.S.C. (Supp. V) 78o(c)(2)	1a-2a
Section 15(c)(3), 15 U.S.C. 78o(c)(3)	3
Section 15(c)(5), 15 U.S.C. 78o(c)(5)	5
Section 17(a), 15 U.S.C. 78q(a)	3, 4
Section 19(a)(4), 15 U.S.C. 78s(a)(4)	5
Section 27, 15 U.S.C. 78aa	5
Rules under the Securities Exchange Act:	
Rule 10b-5, 17 C.F.R. 240.10b-5	7
Rule 15c2-11, 17 C.F.R. 240.15c2-11	4, 5, 9, 3a-9a
Rule 15c3-1, 17 C.F.R. 240.15c3-1	6
Rule 17a-4, 17 C.F.R. 240.17a-4	4
Rule 17a-5, 17 C.F.R. 240.17a-5	6

In the Supreme Court of the United States

OCTOBER TERM, 1976

—
No. 76-58

SAMUEL H. SLOAN, SAMUEL H. SLOAN & Co.,
PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION, ET AL.

—
ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

—
BRIEF FOR THE
SECURITIES AND EXCHANGE COMMISSION
IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, as amended (Pet. App. 1a-5a, 6a-7a), is reported at 535 F. 2d 676. The district court filed no written opinion; its oral statement is set forth at Pet. App. 9a-19a.

(1)

JURISDICTION

The judgment of the court of appeals was entered on March 4, 1976 (Pet. App. 1a) and amended on April 16, 1976, when a timely petition for rehearing was denied (Pet. App. 6a-7a). The petition for a writ of certiorari was filed on July 15, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court properly dismissed petitioners' challenge to the constitutionality of the Securities Exchange Act of 1934 and certain regulations thereunder.
2. Whether the constitutional claims stated in the complaint required the convening of a three-judge court.

STATUTES AND RULES INVOLVED

Petitioners have purported to challenge the constitutionality of the Securities Exchange Act of 1934 in its entirety, and all of the rules promulgated thereunder, in addition to asserting constitutional and other claims with respect to various statutory provisions and rules enumerated in their petition (Pet. 6-7). Certain of these provisions and rules are set forth in the appendix hereto.

STATEMENT

Petitioners seek review of a judgment of the Court of Appeals for the Second Circuit affirming the dis-

missal of petitioners' complaint against the Securities and Exchange Commission and other defendants. Petitioners' complaint, which sought to have the Securities Exchange Act and all rules promulgated thereunder declared unconstitutional and other relief, was filed on June 27, 1974. At that time petitioners were the subject of an administrative proceeding before the Securities and Exchange Commission, initiated pursuant to Sections 15(b)(5) and (7) of the Securities Exchange Act of 1934, 48 Stat. 881, 895, as amended, (15 U.S.C. 78o(b)(5) and (7)), to determine whether the broker-dealer registration of Sloan & Co. should be revoked and Mr. Sloan barred from association with securities brokers and dealers.¹ Petitioners also had been permanently enjoined, after a trial, from violating the recordkeeping and net capital requirements of Sections 17(a) and 15(c)(3) of the Securities Exchange Act, 15 U.S.C. 78q(a) and 78o(c)(3), and certain rules promulgated thereunder.²

¹ On April 28, 1975, the Commission issued an order, after a hearing, which revoked the firm's broker-dealer registration and barred Mr. Sloan from association with any broker or dealer. Securities Exchange Act Release No. 11376. That order is presently before the court of appeals on petition for review. *Samuel H. Sloan d/b/a Samuel H. Sloan & Co. v. Securities and Exchange Commission* (C.A. 2, No. 75-4087).

² The permanent injunction was entered on January 7, 1974. *Securities and Exchange Commission v. Samuel H. Sloan and Samuel H. Sloan & Co.*, 369 F. Supp. 996 (S.D. N.Y.). Petitioners' appeal from the permanent injunction was dismissed by the court of appeals on January 7, 1976 (C.A. 2, No. 74-1436). Mr. Justice Marshall subsequently

Petitioners' amended complaint was filed on October 22, 1974, following a determination by the district court that the original complaint was "too vague and lacking in specifics" (C.A. App. 16).³ The amended complaint may be summarized as follows:

Count I

Count I (C.A. App. A58-A59) seeks declaratory relief based on petitioners' broad assertions that the Securities Exchange Act and all of the rules and

granted petitioners an extension of time until September 10, 1976, to file a petition for a writ of certiorari.

On January 17, 1975, in another action brought by the Commission, petitioners were preliminarily enjoined from violating Section 15(c) (2) of the Securities Exchange Act, 15 U.S.C. 78o(c) (2), and Rule 15c2-11 promulgated thereunder, 17 C.F.R. 240.15c2-11 (antimanipulative rule respecting publication of quotations). Petitioners also were ordered to permit the Commission immediately to examine their books and records, as required by Section 17(a) of the Securities Exchange Act, 15 U.S.C. 78q(a), and Rule 17a-4, promulgated thereunder, 17 C.F.R. 240.17a-4. *Securities and Exchange Commission v. Samuel H. Sloan, individually and d/b/a Samuel H. Sloan & Co.* (S.D.N.Y., No. 74 Civ. 5729 (RJW)). Petitioners' appeal from this preliminary injunction was dismissed by the court of appeals on January 7, 1976 (C.A. 2, No. 75-7056), and Mr. Justice Marshall granted petitioners an extension of time until September 10, 1976, to file a petition for a writ of certiorari in that case.

Mr. Sloan, on September 3, 1975, was adjudged in civil contempt of the January 17, 1975, preliminary injunction. On May 10, 1976, the court of appeals dismissed in part an appeal from that order and affirmed the rulings of the district court in all other respects (535 F.2d 679 (C.A. 2)).

On August 18, 1976, the district court dismissed the underlying injunctive action as moot.

³ "C.A. App." refers to the appendix in the court of appeals, a copy of which is being lodged in this Court.

regulations promulgated thereunder are unconstitutional. Count I alleges that the Commission's rule-making authority under the Securities Exchange Act represents an unconstitutional delegation of authority by Congress and the President prohibited by Article I, Section 1 of the Constitution. The first count also asserts, in conclusory terms, that the Act as a whole, and the entire body of rules promulgated under the Act, are unconstitutionally vague and uncertain; violate provisions of the Bill of Rights and the Fourteenth Amendment; violate the right of contract and other unspecified Constitutional rights; and exceed the boundaries of the commerce clause.

The first count specifically attacks Section 27 of the Securities Exchange Act, 15 U.S.C. 78aa, as unconstitutional because, by reposing exclusive jurisdiction in the federal courts of all actions brought under that Act and the rules thereunder, it allegedly interferes with the jurisdiction of state courts, and because it violates other unspecified rights. Constitutional challenges are also made with respect to Sections 15(c) (5) and 19(a) (4) of the Securities Exchange Act, 15 U.S.C. 78o(c) (5) and 78s(a) (4) (summary trading suspension power);⁴ Commission Rule 15c2-11, 17 C.F.R. 240.15c2-11 (antimanipula-

* Review of the Commission's summary trading suspension power is currently pending in the court of appeals. *Samuel H. Sloan v. Securities and Exchange Commission* (C.A. 2, No. 76-4110). An earlier challenge was involved in *Samuel H. Sloan v. Securities and Exchange Commission*, 527 F. 2d 11 (C.A. 2), certiorari denied, No. 75-1507, June 14, 1976.

tive rule respecting publication of quotations); Commission Rule 15c3-1, 17 C.F.R. 240.15c3-1 (broker-dealer net capital rule); Commission Rule 17a-5, 17 C.F.R. 240.17a-5 (reporting requirements for broker-dealers); and Section 12(g) of the Securities Exchange Act, 15 U.S.C. 78l(g) (reporting requirements for certain issuers of securities). These challenges generally reiterate the general allegations already noted.

Count II

In Count II (C.A. App. A59-A61) petitioners seek money damages and declaratory relief with respect to certain alleged acts by the Commission and members of its staff, who were not named as defendants. Petitioners assert that these activities—including the Commission's suspension of trading in certain securities and its refusal to accept certain amendments to Sloan & Co.'s broker-dealer registration—were unconstitutional, arbitrary, capricious and abusive of delegated authority. Count II also challenges on these grounds the Commission's promulgation or interpretation of Rule 17a-5, which requires broker-dealers to submit certified financial statements on the Commission's Form X-17A-5, and Rule 15c3-1, which requires broker-dealers to adjust their net capital, *inter alia*, to reflect the fact that trading has been suspended in securities in which they hold positions.

Count III

While the introductory language of Count III (C.A. App. A61-A63) names the Securities and Exchange

Commission with the other defendants in connection with alleged violations of the Sherman and Clayton Acts, no specific conduct on the part of the Commission is alleged in Count III and no specific relief is requested against the Commission in that count.

Count IV

Count IV (C.A. App. A63-A64) is purportedly an action based upon common law fraud, as well as Section 10(b) of the Securities Exchange Act, 15 U.S.C. 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. 240-10b-5. It alleges in conclusory terms that the Commission acted fraudulently in failing to give adequate and accurate reasons for suspending trading in securities and in discouraging, in some unspecified way, broker-dealers from entering quotations in the "pink sheets" published by the National Quotation Bureau, Inc.

Count V

Count V (C.A. App. A64) asserts in conclusory terms that petitioners are entitled to damages of \$200,000 as a result of unspecified information allegedly given by an unspecified employee of the Commission to an employee of the National Association of Securities Dealers.

In their *ad damnum*, petitioners seek judgment of \$29,600,000, and a declaratory judgment that the Securities Exchange Act and all the rules promulgated thereunder are unconstitutional and that certain acts of the Commission were unconstitutional,

arbitrary, capricious, and abusive of delegated authority.

On motion of the Commission to dismiss the complaint or in the alternative for summary judgment (C.A. App. A139) and on petitioners' cross-motion to enjoin the Commission from instituting and prosecuting actions under the Securities Exchange Act and for other relief summarized at page 10 of the petition, the district court dismissed the complaint (Pet. App. 9a-19a).

The court of appeals affirmed, characterizing petitioners' arguments as frivolous (Pet. App. 1a-5a).

ARGUMENT

1. The court of appeals, in an opinion on which we rely, properly characterized as "frivolous" (Pet. App. 4a) petitioners' "blunderbuss attack" on the constitutionality of the Securities Exchange Act and various provisions and rules promulgated thereunder. The court correctly determined that the challenged provisions of the Act and the Commission's rules thereunder "are valid and reasonable exercises of congressional power under the commerce clause and the SEC's delegated regulatory power, which infringe no constitutional rights of plaintiff" (Pet. App. 4a). No further review of this issue is warranted.

2. The court of appeals was not required "to remand the action to the district court with instructions to convene a three-judge court" (Pet. 17). A three-judge court need not be convened "when the consti-

tutional attack * * * is insubstantial," *Goosby v. Osser*, 409 U.S. 512, 518. Here, the constitutional attack upon the Securities Exchange Act and other related allegations were "patently without merit," *Bell v. Hood*, 327 U.S. 678, 683, and could be dismissed by a single district judge. See also *Hagans v. Lavine*, 415 U.S. 528.⁵

3. Petitioners' antitrust attacks appear to be based, in part at least, on the cooperation of the National Quotation Bureau, Inc., in enforcing the Commission's Rule 15c2-11 (Pet. 8-9, 15, 25). This rule defines as a "fraudulent, manipulative and deceptive practice" the publication by a broker-dealer of quotations for securities about which current data is not available—a rule that is within the scope of Section 15(c)(2) of the Act, authorizing the Commission to define (a) "fraudulent, deceptive or manipulative" acts and practices of securities brokers and dealers and (b) quotations that are "fictitious." Moreover, the court of appeals properly concluded that "none of the actions charged constitute antitrust violations, essentially because they were taken pursuant to the scheme of securities regulation established by the Securities Exchange Act of 1934. See generally, *United States v. National Association of Securities Dealers, Inc.*, 422 U.S. 694 (1975); *Gordon v. New*

⁵ Moreover, petitioners sought relief against the Commission *eo nomine* (as distinguished from bringing the action against individual commissioners allegedly acting in excess of their authority); the district court therefore was without jurisdiction respecting the charges against the Commission. *National Labor Relations Board v. Nash-Finch Co.*, 404 U.S. 138, 146, n. 4; *Holmes v. Eddy*, 341 F.2d 477, 480 (C.A. 4).

York Stock Exchange, 422 U.S. 659 (1975)" (Pet. App. 5a).

4. The court of appeals also correctly held that petitioners' remaining arguments were without merit (Pet. App. 5a, n. 5). None of these issues warrants consideration by this Court.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

DAVID FERBER,
Solicitor to the Commission,

FREDERICK B. WADE,
*Attorney,
Securities and Exchange Commission.*

SEPTEMBER 1976.

APPENDIX A

Prior to Securities Acts Amendments of 1975, which became effective on June 4, 1975, Section 15 (c) (2) of the Securities Exchange Act of 1934, as added, 52 Stat. 1075, 15 U.S.C. 78o(c) (2), provided as follows:

No broker or dealer shall make use of the mails or of any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange, in connection with which such broker or dealer engages in any fraudulent, deceptive, or manipulative act or practice, or makes any fictitious quotation. The Commission shall, for the purposes of this paragraph, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative and such quotations as are fictitious.

The amended Section 15(c) (2), Pub. L. 94-29, 89 Stat. 125, 15 U.S.C. (Supp. V) 78o(c) (2), now provides:

No broker or dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange of which it is a member, in connection with which such broker or dealer en-

gages in any fraudulent, deceptive, or manipulative act or practice, or makes any fictitious quotation, and no municipal securities dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any municipal security in connection with which such municipal securities dealer engages in any fraudulent, deceptive, or manipulative act or practice, or makes any fictitious quotation. The Commission shall, for the purposes of this paragraph, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative and such quotations as are fictitious.

APPENDIX B

Commission Rule 15c2-11, 17 C.F.R. 240.15c2-11, provides as follows:

§ 240.15c2-11 Initiation or resumption of quotations without specific information.

(a) It shall be a fraudulent, manipulative, and deceptive practice within the meaning of section 15(c)(2) of the Act, for a broker or dealer to publish any quotation for a security or, directly or indirectly, to submit any such quotation for publication, in any quotation medium (as defined in this section) unless:

(1) The issuer has filed a registration statement under the Securities Act of 1933 which became effective less than 90 calendar days prior to the day on which such broker or dealer publishes or submits the quotation to the quotation medium: *Provided*, That such registration statement has not thereafter been the subject of a stop order which is still in effect when the quotation is published or submitted, and such broker or dealer has in his records a copy of the prospectus specified by section 10(a) of the Securities Act of 1933: or

(2) The issuer has filed a notification under Regulation A under the Securities Act of 1933 which became effective less than 40 calendar days prior to the day on which such broker or dealer publishes or submits the quotation to the quotation medium: *Provided*, That the offering circular provided for under Regulation A has not thereafter become the subject of a suspension order which is still in effect when the quotation

is published or submitted, and such broker or dealer has in his records a copy of such offering circular; or

(3) (i) The issuer is required to file reports pursuant to section 13 or 15(d) of the Act, or is the issuer of a security covered by section 12(g) (2) (B) or (G) of the Act, and

(ii) The broker or dealer has a reasonable basis for believing that the issuer is current in filing the reports required to be filed at regular intervals pursuant to section 13 or 15(d) of the Act, or, in the case of insurance companies exempted from section 12(g) of the Act by section 12(g)(2)(G) thereof, the annual statement referred to in section 12(g)(2)(G)(i) of the Act; and

(iii) The broker or dealer has in his records the issuer's most recent annual report filed pursuant to section 13 or 15(d) of the Act, or the annual statement in the case of an insurance company not subject to section 12(g) of the Act, together with any other reports required to be filed at regular intervals under such provisions of the Act which have been filed by the issuer after such annual report or annual statement; or

(4) Such broker or dealer has in his records, and shall make reasonably available upon request to any person expressing an interest in a proposed transaction in the security with such broker or dealer, the following information (which shall be reasonably current in relation to the day the quotation is submitted), which he has no reasonable basis for believing is not true and correct or reasonably current, and which was obtained by him from sources which he has a

reasonable basis for believing are reliable: (i) The exact name of the issuer and its predecessor (if any); (ii) the address of its principal executive offices; (iii) the state of incorporation, if it is a corporation; (iv) the exact title and class of the security; (v) the par or stated value of the security; (vi) the number of shares or total amount of the securities outstanding as of the end of the issuer's most recent fiscal year; (vii) the name and address of the transfer agent; (viii) the nature of the issuer's business; (ix) the nature of products or services offered; (x) the nature and extent of the issuer's facilities; (xi) the name of the chief executive officer and members of the board of directors; (xii) the issuer's most recent balance sheet and profit and loss and retained earnings statements; (xiii) similar financial information for such part of the 2 preceding fiscal years as the issuer or its predecessor has been in existence; (xiv) whether the broker or dealer or any associated person is affiliated, directly or indirectly with the issuer; (xv) whether the quotation is being published or submitted on behalf of any other broker or dealer, and, if so, the name of such broker or dealer; and (xvi) whether the quotation is being submitted or published directly or indirectly on behalf of the issuer, or any director, officer or any person, directly or indirectly the beneficial owner of more than 10 percent of the outstanding units or shares of any equity security of the issuer, and, if so, the name of such person, and the basis for any exemption under the federal securities laws for any sales of such securities on behalf of such person. If such information is

made available to others upon request pursuant to this subparagraph, such delivery, unless otherwise represented, shall not constitute a representation by such broker or dealer that such information is true and correct, but shall constitute a representation by such broker or dealer that the information is reasonably current in relation to the day the quotation is submitted, that he has no reasonable basis for believing the information is not true and correct, and that the information was obtained from sources which he has a reasonable basis for believing are reliable.

(b) With respect to any security the quotation of which is within the provisions of this section, the broker or dealer submitting or publishing such quotation shall maintain in his records information regarding all circumstances involved in the submission or publication of such quotation, including the identity of the person or persons for whom the quotation is being submitted or published and any information regarding the transaction provided to the broker or dealer by such person or persons.

(c) The broker or dealer shall maintain in writing as part of his records the information described in paragraphs (a) and (b) of this section, and any other information (including adverse information) regarding the issuer which comes to his knowledge or possession before the publication of [sic] submission of the quotation, and preserve such records for the periods specified in § 240.17a-4.

(d) For any security of an issuer included in paragraph (a)(4) of this section, the broker or dealer submitting the quotation shall furnish to

the inter-dealer quotation system (as defined in paragraph (e)(1) of this section), in such form as such system shall prescribe, at least 2 days before the quotation is published or submitted, the information regarding the security and the issuer which such broker or dealer is required to maintain pursuant to said paragraph (a)(4) of this section.

(e) For purposes of this section:

(1) "Quotation medium" shall mean any "interdealer quotation system" or any publication or electronic communications network or other device which is used by brokers or dealers to make known to others their interest in transactions in any security, including offers to buy or sell at a stated price or otherwise, or invitations of offers to buy or sell.

(2) "Interdealer quotation system" shall mean any system of general circulation to brokers or dealers which regularly disseminates quotations of identified brokers or dealers.

(3) Except as otherwise specified in this section, "quotation" shall mean any bid or offer at a specified price with respect to a security.

(f) The provisions of this section shall not apply to:

(1) The publication or submission of a quotation respecting a security admitted to trading on a national securities exchange and which is traded on such an exchange on the same day as, or on the business day next preceding, the day the quotation is published or submitted.

(2) The publication or submission of a quotation for securities of foreign issuers exempt from

section 12(g) of the Act by reason of compliance with the provisions of § 240.12g3-2(b).

(3) The publication or submission of a quotation respecting a security which has been the subject of both bid and ask quotations in an inter-dealer quotation system at specified prices on each of at least 12 days within the previous 30 calendar days, with no more than 4 business days in succession without such a two-way quotation.

(g) The requirement in paragraph (a)(4) of this section that the information with respect to the issuer be "reasonably current" will be presumed to be satisfied, unless the broker or dealer has information to the contrary, if:

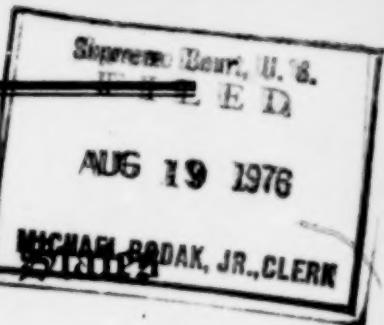
(1) The balance sheet is as of a date less than 16 months before the publication or submission of the quotation, the statements of profit and loss and retained earnings are for the 12 months preceding the date of such balance sheet, and if such balance sheet is not as of a date less than 6 months before the publication or submission of the quotation, it shall be accompanied by additional statements of profit and loss and retained earnings for the period from the date of such balance sheet to a date less than 6 months before the publication or submission of the quotation.

(2) Other information regarding the issuer specified in paragraph (a)(4) of this section is as of a date within 12 months prior to the publication or submission of the quotation.

(h) This section shall not prohibit any publication or submission of any quotation if the Commission, upon written request or upon its

own motion, exempts such quotation either unconditionally or on specified terms and conditions, as not constituting a fraudulent, manipulative or deceptive practice comprehended within the purpose of this section.

IN THE
Supreme Court of the United States
OCTOBER TERM—1976



No. 76-58

SAMUEL H. SLOAN and SAMUEL H. SLOAN & CO.,
Petitioners,
—against—

**SECURITIES AND EXCHANGE COMMISSION,
UNITED STATES OF AMERICA as the SECUR-
ITIES AND EXCHANGE COMMISSION, NATIONAL
QUOTATION BUREAU, INC., BUNKER RAMO COR-
PORATION, NATIONAL ASSOCIATION OF SECUR-
ITIES DEALERS, INC., DISCLOSURE, INC. and
NATIONAL CLEARING CORPORATION,**

Respondents.

**On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Second Circuit**

**BRIEF FOR RESPONDENT NATIONAL QUOTATION
BUREAU, INC. IN OPPOSITION TO THE PETITION
FOR A WRIT OF CERTIORARI**

WILLIAM F. KOEGEL
REX W. MIXON, JR.
200 Park Avenue
New York, New York 10017
Tel. (212) 972-7000
*Attorneys for Respondent
National Quotation Bureau, Inc.*

Of Counsel:

ROGERS & WELLS

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
QUESTIONS PRESENTED	2
STATUTES INVOLVED	3
STATEMENT OF THE CASE	5
REASONS WHY THE WRIT SHOULD BE DENIED	6
POINT I—The courts below correctly dismissed the allegations respecting antitrust violations	6
POINT II—The courts below correctly dismissed the allegations respecting securities law and common law fraud	9
CONCLUSION	11
AFFIDAVIT OF SERVICE	12

Table of Authorities

Cases Cited

Albert H. Cayne Equip. Corp. v. Union Asbestos & Rubber Co., 220 F. Supp. 784 (S.D.N.Y. 1963)	8
American Tobacco v. United States, 328 U.S. 781 (1946)	7, 8
Gerstle v. Gamble-Skogmo, Inc., 478 F.2d 1281 (2d Cir. 1973)	10
International Business Machines Corp. v. United States, 298 U.S. 131 (1936)	9
Jo Ann Homes v. Dworetz, 25 N.Y.2d 112, 302 N.Y.S. 2d 799, 250 N.E.2d 214 (1969)	10

	PAGE
Karlinsky v. New York Racing Association, Inc., 310 F. Supp. 937 (S.D.N.Y. 1970)	8
Lanza v. Drexel & Co., 479 F.2d 1277 (2d Cir. 1973)	10
List v. Fashion Park, Inc., 340 F.2d 457 (2d Cir. 1965), <i>cert. denied</i> , 382 U.S. 811 (1965)	10
McElhenney Co. v. Western Auto Supply Co., 269 F.2d 332 (4th Cir. 1959)	9
Shapiro v. Merrill Lynch, Pierce, Fenner & Smith Inc., 495 F.2d 228 (2d Cir. 1974)	10
Shemtob v. Shearson, Hammill & Co., 448 F.2d 442 (2d Cir. 1971)	9
Tampa Electric Co. v. Nashville Co., 365 U.S. 320 (1961)	9
Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953)	8
Union Leader Corp. v. Newspapers of New England, Inc., 284 F.2d 582 (1st Cir. 1960), <i>cert. denied</i> , 365 U.S. 833 (1961)	8
United States v. Aluminum Co. of America, 148 F. 2d 416 (2d Cir. 1945)	8
United States v. Chas. Pfizer & Co., 245 F. Supp. 737 (E.D.N.Y. 1965)	8
United States v. duPont & Co., 351 U.S. 377 (1956)	7
United States v. Griffith, 334 U.S. 100 (1948)	7
United States v. Grinnell Corp., 384 U.S. 563 (1966)	7

	PAGE
Statutes Cited	
15 U.S.C.:	
Sec. 1	2, 3, 5, 6
Sec. 2	2, 3, 5-8
Sec. 14	2, 3, 5, 6, 8
Sec. 78j(b)	4
Regulation Cited	
17 C.F.R.:	
Sec. 240.10b-5	2, 4, 5, 10
Rules Cited	
Rule 19, Supreme Court Rules	6
Rule 9(b), Fed. R. Civ. P.	9
Rule 12(c), Fed. R. Civ. P.	5

IN THE
Supreme Court of the United States

OCTOBER TERM—1976

No. 76-58

SAMUEL H. SLOAN and SAMUEL H. SLOAN & CO.,
Petitioners,
—against—

SECURITIES AND EXCHANGE COMMISSION,
UNITED STATES OF AMERICA as the SECUR-
ITIES AND EXCHANGE COMMISSION, NATIONAL
QUOTATION BUREAU, INC., BUNKER RAMO COR-
PORATION, NATIONAL ASSOCIATION OF SECUR-
ITIES DEALERS, INC., DISCLOSURE, INC. and
NATIONAL CLEARING CORPORATION,

Respondents.

**On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Second Circuit**

**BRIEF FOR RESPONDENT NATIONAL QUOTATION
BUREAU, INC. IN OPPOSITION TO THE PETITION
FOR A WRIT OF CERTIORARI**

Opinions Below

The opinions of the United States District Court for
the Southern District of New York dismissing the amended

complaint and denying petitioners' motions, and of the United States Court of Appeals for the Second Circuit unanimously affirming the dismissal of the amended complaint and denial of petitioners' motions, are set forth at Appendices D and A, respectively, of the Petition herein and shall not be repeated here.

Questions Presented

Petitioners do not accurately set forth the questions presented. The actual questions presented are:

1. Should the Supreme Court grant the Petition to review the decisions by the courts below dismissing the amended complaint against National Quotation Bureau, Inc. for alleged violations of Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act where National Quotation Bureau, Inc. publishes and sells price quotations of securities traded on the over-the-counter market:

- (a) in competition with other stock quotation services;
- (b) without ever requiring subscribers to deal exclusively with it and refrain from dealing with other stock quotation services; and
- (c) within the guidelines and regulations promulgated by the S.E.C.?

2. Should the Supreme Court grant the Petition to review the decisions by the courts below dismissing the amended complaint against National Quotation Bureau, Inc. for alleged violations of the antifraud provisions of the common law and federal securities laws, particularly Rule 10b-5, based upon its alleged cooperation with the

S.E.C. and refusal to permit petitioners to list markets in its stock quotation service?

Statutes Involved

Section 1 of the Sherman Act, 15 U.S.C. § 1:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: . . .

Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a felony, . . ."

Section 2 of the Sherman Act, 15 U.S.C. § 2:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, . . ."

Section 3 of the Clayton Act, 15 U.S.C. § 14:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon,

such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b):

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

Rule 10b-5, 17 C.F.R. § 240.10b-5:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary

of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."

Statement of the Case

The Petition herein seeks review of the decisions of the United States District Court for the Southern District of New York dismissing the amended complaint without leave to replead* and denying petitioners' motions, and of the United States Court of Appeals for the Second Circuit unanimously affirming the same.

The amended complaint asserts five counts. Counts I and II are directed against the S.E.C., seeking declaratory relief that the Securities Exchange Act of 1934 and the rules and regulations promulgated thereunder are unconstitutional, and damages resulting from certain alleged acts of the S.E.C. Count III alleges that National Quotation Bureau, Inc. ("NQB"), and other private party defendants, violated Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act. Count IV alleges that NQB, and other private party defendants, violated the antifraud provisions of the common law and federal securities laws, particularly Rule 10b-5. Finally, Count V seeks declaratory relief that petitioners do not owe NQB the amount previously paid pursuant to petitioners' bill with NQB.

* The District Court granted the motion by National Quotation Bureau, Inc. pursuant to Rule 12(c) of the Federal Rules of Civil Procedure for judgment on the pleadings.

The decisions below are clearly correct on the merits, and in any event raise no question which calls for review by this Court. As further set forth below, the District Court's decision, and the unanimous affirmance by the Court of Appeals, are not in conflict with the applicable decisions of this Court or other courts of appeals on the same matter. Indeed, the District Court concluded that the claim asserted by the amended complaint against NQB was "patently frivolous" (Petition, Appendix D, page 17a), and the Court of Appeals cautioned petitioners that it may be appropriate to assess penalties against them "if the same arguments which we have dismissed as frivolous are put before us again in the future" (Petition, Appendix A, page 5a).

Under Rule 19 of the rules of this Court, the Petition should be denied since petitioners have made no showing, nor could there be any showing, of "special and important reasons" which call for this Court to review the decisions below.

REASONS WHY THE WRIT SHOULD BE DENIED

POINT I

The courts below correctly dismissed the allegations respecting antitrust violations.

Count III of the amended complaint alleges that NQB violated Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act because NQB "operates a monopoly" by publishing stock quotations known as the "pink sheets" (Petition, page 14) (A61-63).*

* Pages in the Joint Appendix in the Court of Appeals will be cited in this matter.

As set forth in the undisputed affidavit of NQB's Executive Vice President David Burnett (A149-151) submitted in support of NQB's motion to dismiss the amended complaint, "Since 1971 the National Association of Securities Dealers has provided electronic automated Over-the-Counter quotations to broker-dealers" in competition with the stock quotation services published and sold by NQB (A149-150). The Burnett affidavit points out that the subscription rate to NQB's daily stock quotation service is \$60 per month for each subscription (A150-151), which is charged uniformly to all broker-dealers. As further set forth in the Burnett affidavit, "At no time has NQB ever required its subscribers to deal exclusively with it in supplying or receiving Over-the-Counter securities quotations" (A151).

The court below correctly dismissed the petitioners' claims against NQB for alleged antitrust violations. It is well settled by decisions of this Court that the offense of "actual monopolization" under Section 2 of the Sherman Act, the claim which petitioners assert here (Petition, page 14), requires the existence of monopoly power in the relevant market, together with an intent and purpose to exercise that power. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-1 (1966); *United States v. duPont & Co.*, 351 U.S. 377, 389-391 (1956); *United States v. Griffith*, 334 U.S. 100, 107 (1948). Here, there is, however, no allegation, nor could there be, that NQB has monopoly power within the meaning of Section 2; that is, as this Court has said, the power to fix prices in, or to exclude competition from, the relevant market.* *American Tobacco v. United States*, 328 U.S. 781,

* The amended complaint makes no effort to allege an attempt to monopolize under Section 2, which requires the existence of a specific intent to control prices in, or exclude competition from, a relevant market.

(Footnote continued on following page)

811 (1946); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 429-432 (2d Cir. 1945); *Albert H. Cayne Equip. Corp. v. Union Asbestos & Rubber Co.*, 220 F. Supp. 784, 788 (S.D.N.Y. 1963).

Indeed, as held by the court in granting a motion to dismiss the complaint in *Karlinsky v. New York Racing Association, Inc.*, 310 F. Supp. 937, 940 (S.D.N.Y. 1970), "plaintiffs, on their claim for monopolization under § 2 of the Sherman Act, never allege a relevant market, the activity monopolized or defendants' control of the market. All three allegations are necessary for a proper claim of monopolization [citations omitted] . . ." Accordingly, the courts below properly dismissed petitioners' amended complaint for failure to make the necessary showing of a Section 2 violation, that is, to allege a relevant market, the activity monopolized and control of the market.

Similarly, the courts below correctly dismissed petitioners' claim that NQB violated Section 3 of the Clayton Act. The record is undisputed that NQB has never "required its subscribers to deal exclusively with it in supplying or receiving Over-the-Counter securities quotations" (A151). This fact, which petitioners concede (A39), is particularly significant since, as this Court has said, the gravamen of a violation of Section 3 of the Clayton Act

(Footnote continued from preceding page)

vant market. *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 626 (1953); *United States v. Aluminum Co. of America*, 148 F.2d 416, 431-2 (2d Cir. 1945). Courts have uniformly dismissed allegations respecting a Section 2 violation based upon an attempt to monopolize unless plaintiffs make "some affirmative showing of conduct from which a wrongful intent can be inferred." *Union Leader Corp. v. Newspapers of New England, Inc.*, 284 F.2d 582, 584 (1st Cir. 1960), cert. denied, 365 U.S. 833 (1961); *United States v. Chas. Pfizer & Co.*, 245 F. Supp. 737, 739 (E.D.N.Y. 1965).

is the forbidden "condition, agreement, or understanding" of exclusivity, that is, that the purchaser shall not deal in the goods of a competitor of the seller. *Tampa Electric Co. v. Nashville Co.*, 365 U.S. 320, 329-330 (1961); *International Business Machines Corp. v. United States*, 298 U.S. 131, 137 (1936); *McElhenney Co. v. Western Auto Supply Co.*, 269 F.2d 332, 338 (4th Cir. 1959).

In conclusion, the courts below, in accordance with the decisions of this Court and other courts of appeals, correctly dismissed the alleged antitrust violations by NQB.

POINT II

The courts below correctly dismissed the allegations respecting securities law and common law fraud.

The courts below correctly dismissed Count IV of the amended complaint which alleges federal securities law and common law fraud. The district court characterized this part of the amended complaint as a "particularly irrational claim against certain defendants" (Petition, Appendix D, page 17a).

Petitioners' allegations of fraud (Petition, page 15) are obviously conclusory in nature and accordingly fail to comply with Rule 9(b) of the Federal Rules of Civil Procedure which provides that "In all averments of fraud . . ., the circumstances constituting fraud . . . shall be stated with particularity." See, e.g., *Shemtob v. Shearson, Hammill & Co.*, 448 F.2d 442, 444 (2d Cir. 1971). The courts below correctly applied the relevant law in dismissing the allegations of securities law and common law fraud since they are wholly conclusory and fail to show that any fraud or deception was committed in connection with any misrepresentation or omission by any defendant.

Further, petitioners do not begin to make the slightest showing of a violation of Rule 10b-5. There are no allegations, nor could there be, as required by Rule 10b-5, of fraud or deception by NQB "in connection with the purchase or sale of any security." Indeed, there are no allegations that NQB misrepresented or failed to disclose any material fact to petitioners, *Gerstle v. Gamble-Skogmo, Inc.*, 478 F.2d 1281, 1301-1302 (2d Cir. 1973), with the requisite fraudulent intent or scienter, *Lanza v. Drexel & Co.*, 479 F.2d 1277, 1301-1305 (2d Cir. 1973). Further, petitioners made no showing, nor could they, that they relied to their detriment upon any alleged misrepresentation or omission by NQB, *List v. Fashion Park, Inc.*, 340 F.2d 457, 462, 463 (2d Cir. 1965), cert. denied, 382 U.S. 811 (1965), which in fact caused damage to them, *Shapiro v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 495 F.2d 228, 238-40 (2d Cir. 1974).

In addition, the conclusory allegations that NQB committed common law fraud lack the necessary particularity and fail to state a cause of action under the applicable common law. As the New York Court of Appeals stated in *Jo Ann Homes v. Dworetz*, 25 N.Y. 2d 112, 119, 302 N.Y.S. 2d 799, 803, 250 N.E. 2d 214, 217 (1969), in order to sustain an action in common law fraud "There must be a representation of fact, which is either untrue or known to be untrue or recklessly made, and which is offered to deceive the other party and to induce them to act upon it, causing injury." Here, petitioners' amended complaint fails to allege any of the necessary elements for a cause of action in common law fraud.

In summary, the courts below clearly applied the relevant authorities and dismissed the allegations of securities law and common law fraud by NQB.

CONCLUSION

In short, the Petition raises no issue worthy of this Court's consideration. The decisions of the District Court and Court of Appeals are eminently sound, consistent with the holdings of this Court, and present no conflicts with decisions of other courts of appeals.

For all of the foregoing reasons, the Petition for writ of certiorari should be denied.

Dated: August 18, 1976

Respectfully submitted,

WILLIAM F. KOEGEL
REX W. MIXON, JR.
200 Park Avenue
New York, New York 10017
Tel. (212) 972-7000
*Attorneys for Respondent
National Quotation Bureau, Inc.*

Of Counsel:

ROGERS & WELLS

Affidavit of Service

STATE OF NEW YORK }
COUNTY OF NEW YORK }ss.:

REX W. MIXON, Jr., being duly sworn, deposes and says that, pursuant to Rule 33 of the Supreme Court Rules, he served the foregoing Brief upon counsel of record for each party by mailing on August 18, 1976, three true and correct copies thereof, first class mail postage prepaid, to Samuel H. Sloan, Petitioner *pro se*, 917 Old Trents Ferry Road, Lynchburg, Virginia 24503; Thomas L. Taylor, III, Esq., Securities and Exchange Commission, 500 North Capitol Street, Washington, D.C. 20549; Solicitor General, Department of Justice, Washington, D.C. 20530; Lloyd J. Derrickson, Esq., Robert J. Woldow, Esq., Jeffrey M. Silow, Esq., 1735 K Street, N.W., Washington, D.C. 20006; and Patricia Anne Williams, Esq., Willkie, Farr & Gallagher, One Chase Manhattan Plaza, New York, New York 10005.

/s/ REX W. MIXON, JR.
Rex W. Mixon, Jr.

Sworn to before me this
18th day of August, 1976.

Notary Public

Supreme Court
FILED

Aug. 19 1976

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
October Term, 1976

No. 76-58

SAMUEL H. SLOAN, SAMUEL H. SLOAN & CO.,
Petitioners,
against

SECURITIES & EXCHANGE COMMISSION, UNITED STATES
OF AMERICA AS THE SECURITIES & EXCHANGE
COMMISSION, NATIONAL QUOTATION BUREAU, INC.,
BUNKER RAMO CORP., NATIONAL ASSOCIATION OF
SECURITIES DEALERS, INC., DISCLOSURE, INC., NA-
TIONAL CLEARING CORP.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT DISCLOSURE, INC.
IN OPPOSITION

WILLKIE FARR & GALLAGHER
Attorneys for Respondent
Disclosure, Inc.
1 Chase Manhattan Plaza
New York, New York 10005
(212) 248-1000

ANTHONY F. PHILLIPS,
MICHAEL B. TARGOFF,
PATRICIA ANNE WILLIAMS,
Of Counsel

IN THE
Supreme Court of the United States
October Term, 1976

No. 76-58

SAMUEL H. SLOAN, SAMUEL H. SLOAN & Co.,

Petitioners,

against

SECURITIES & EXCHANGE COMMISSION, UNITED STATES OF
AMERICA AS THE SECURITIES & EXCHANGE COMMISSION,
NATIONAL QUOTATION BUREAU, INC., BUNKER RAMO CORP.,
NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., DIS-
CLOSURE, INC., NATIONAL CLEARING CORP.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

**BRIEF FOR RESPONDENT DISCLOSURE, INC.
IN OPPOSITION**

Opinions Below

The oral decision of the District Court (Appendix D of the Petition) and the opinion of the Court of Appeals for the Second Circuit as amended (Appendices A and B of the Petition) are not officially reported.

Jurisdiction

The jurisdictional requirements are adequately set forth in the Petition.

Statutes Involved

The pertinent provisions of the Sherman Act (15 U.S.C. §§ 1 and 2) and of the Clayton Act (15 U.S.C. § 14) are set forth herein as Appendix I.

Question Presented

Whether the Amended Complaint states a cause of action as against respondent Disclosure, Inc. under Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act.

Statement of the Case

Disclosure, Inc. has a contract with the Office of Records and Services of the Securities and Exchange Commission (the "S.E.C."). By the terms of this contract, Disclosure, Inc. performs duplicating services for the S.E.C., *inter alia*. Petitioner's Amended Complaint alleges that these facts constitute violations of the federal antitrust laws as set forth above.

ARGUMENT

As to respondent Disclosure, Inc., the sole issue in this case is whether the mere allegation of an exclusive contract between Disclosure, Inc. and the federal government is sufficient to state a claim under the federal antitrust laws. Disclosure, Inc. contends that this issue is a narrow one and does not warrant review by this Court on certiorari. The most cogent support for this position can be found in the Statement of the Case set forth in the Petition itself. Disclosure, Inc. is nowhere mentioned therein save for the fact that it holds a contract to perform certain services for the S.E.C. In fact, that portion of the petitioner's State-

ment of the Case which discusses the one count of the Amended Complaint purporting to state a claim against respondent Disclosure, Inc. is conspicuously devoid of any mention of Disclosure, Inc.

The petition for certiorari is patently frivolous as to the claims made against respondent Disclosure, Inc. Respondent Disclosure, Inc. relies on, incorporates by reference herein and respectfully refers this Court to its brief on appeal to the Second Circuit (annexed hereto as Appendix II) and the opinions of both the District Court and the Court of Appeals for the Second Circuit (Appendices D and A of the petition respectively).

In sum, the opinions below are clearly correct. The petition asserts no conflict of decision nor important questions of federal law as to respondent Disclosure, Inc. Hence, there is no basis for the granting of review by this Court on certiorari.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Dated: New York, New York
August 17, 1976.

Respectfully submitted,

WILLKIE FARR & GALLAGHER

Attorneys for Respondent

Disclosure, Inc.

1 Chase Manhattan Plaza

New York, New York 10005

(212) 248-1000

ANTHONY F. PHILLIPS

MICHAEL B. TARGOFF

PATRICIA ANNE WILLIAMS

Of Counsel

APPENDICES

APPENDIX I**The Sherman Act—15 U.S.C.**

“§1. Trusts, etc. in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall

Appendix I

be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

"§ 2. Monopolizing trade a misdemeanor; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

The Clayton Act—15 U.S.C.

"§ 14. Sale, etc., on agreement not to use goods of competitor

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

APPENDIX II**Brief of Disclosure, Inc. as Defendant-Appellee****Table of Contents**

	PAGE
Preliminary Statement	A-6
Issues Presented	A-6
The Nature of the Case and Proceedings Below	A-7
Summary of Argument	A-8
POINT I—The Amended Complaint Fails to State A Claim Upon Which Relief Can Be Granted	A-8
A. Congressional Mandate Exempts Disclosure's Contract with the S.E.C. from the Antitrust Laws	A-9
B. Disclosure's Contract with the S.E.C. Does Not Constitute an Unlawful Restraint of Trade	A-11
C. Disclosure's Contract with the S.E.C. Does Not Constitute Unlawful Monopolization ..	A-12
D. Disclosure's Contract with the S.E.C. Is not within the Parameters of Section 3 of the Clayton Act	A-14
E. Appellants Lack Standing to Sue	A-15
POINT II—Appellants Concede that Disclosure is Not a Real Party Defendant	A-16
CONCLUSION	A-18

Table of Authorities**CASES:**

American Tobacco Co. v. United States, 328 U.S. 781 (1946)	A-13
---------------------------------------------------------------------	------

Appendix II

	PAGE
<i>Beckman v. Walter Kidde & Co.</i> , 316 F. Supp. 1321 (E.D.N.Y. 1970), <i>aff'd</i> , 451 F.2d 593 (2d Cir. 1971), <i>cert. denied</i> , 408 U.S. 922 (1972)	A-12
<i>Billy Baxter, Inc. v. Coca-Cola Co.</i> , 431 F.2d 183 (2d Cir. 1970), <i>cert. denied</i> , 401 U.S. 923 (1971)	A-16
<i>Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.</i> , 454 F.2d 1292 (2d Cir. 1971), <i>cert. denied</i> , 406 U.S. 930 (1972)	A-16
<i>E. W. Wiggins Airways Inc. v. Mass. Port Authority</i> , 362 F.2d 52 (1st Cir.), <i>cert. denied</i> , 385 U.S. 947 (1966)	A-9
<i>Foster v. National Biscuit Co.</i> , 31 F. Supp. 552 (W.D. Wash., N.D. 1940)	A-9
<i>Karlinsky v. New York Racing Ass'n, Inc.</i> , 310 F. Supp. 937 (S.D.N.Y. 1970)	A-14
<i>Keco Industries, Inc. v. Borg-Warner Corp.</i> , 334 F. Supp. 1240 (M.D. Pa. 1971)	A-14
<i>Klor's, Inc. v. Broadway-Hale Stores, Inc.</i> , 359 U.S. 207 (1957)	A-12
<i>Literature, Inc. v. Quinn</i> , 482 F.2d 372 (1st Cir. 1973)	A-9
<i>Miclau v. Miclau</i> , 58 F.R.D. 207 (D. Puerto Rico 1972)	A-9
<i>MDC Data Centers, Inc. v. International Business Machines Corp.</i> , 342 F. Supp. 502 (E.D. Pa. 1972)	A-15
<i>Parker v. Brown</i> , 317 U.S. 341 (1943)	A-9
<i>Robins v. Rarback</i> , 325 F.2d 929 (2d Cir. 1963), <i>cert. denied</i> , 379 U.S. 974 (1965)	A-9
<i>SCM v. Radio Corp. of America</i> , 276 F. Supp. 373 (S.D.N.Y. 1967), <i>aff'd</i> , 407 F.2d 166 (2d Cir.), <i>cert. denied</i> , 395 U.S. 943, <i>reh. denied</i> , 396 U.S. 869 (1969)	A-16
<i>Standard Oil Co. v. U.S.</i> , 221 U.S. 1 (1911)	A-11
<i>Union Carbide & Carbon Corp. v. Nisley</i> , 300 F.2d 561 (10th Cir. 1961), <i>cert. denied, sub nom. Wade et al. v. Union Carbide & Carbon Corp.</i> , 371 U.S. 801 (1962)	A-10

Appendix II

	PAGE
<i>United States v. Arnold, Schwinn & Co.</i> , 388 U.S. 365 (1967)	A-11
<i>United States v. E. I. Du Pont De Nemours & Co.</i> , 351 U.S. 377 (1956)	A-14
<i>United States v. Grinnell Corp.</i> , 384 U.S. 563 (1966)	A-13, 14
<i>United States v. Paramount Pictures, Inc.</i> , 334 U.S. 131 (1948)	A-13
<i>Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.</i> , 382 U.S. 172 (1965)	A-14
 STATUTES:	
<i>Sherman Antitrust Act</i> , § 1, 15 U.S.C. § 1	A-7, 8, 11
<i>Sherman Antitrust Act</i> , § 2, 15 U.S.C. § 2	A-7, 8, 12, 13
<i>Sherman Antitrust Act</i> , § 8, 15 U.S.C. § 8	A-9
<i>Clayton Antitrust Act</i> , § 1, 15 U.S.C. § 12	A-9
<i>Clayton Antitrust Act</i> , § 3, 15 U.S.C. § 14	A-7, 8, 14 to 15
<i>Clayton Antitrust Act</i> , § 4, 15 U.S.C. § 15	A-15
<i>Government Contract Procurement Procedures</i> , § 252, 41 U.S.C. § 252	A-10
 OTHER AUTHORITIES:	
<i>Section of Antitrust Law of the American Bar Association, Antitrust Law Developments</i> (1975)	A-10
<i>5 Wright & Miller, Federal Practice and Procedure: Civil</i> § 1357	A-9

Appendix II

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SAMUEL H. SLOAN
SAMUEL H. SLOAN & Co.,
Plaintiffs,
against
SECURITIES AND EXCHANGE COMMISSION, UNITED STATES OF
AMERICA as the SECURITIES & EXCHANGE COMMISSION, NA-
TIONAL QUOTATION BUREAU, INC., BUNKER RAMO CORP.,
NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., DIS-
CLOSURE INC., and NATIONAL CLEARING CORP.,
Defendants.

**BRIEF OF DISCLOSURE INC.,
AS DEFENDANT-APPELLEE**

Preliminary Statement

Disclosure Inc. ("Disclosure") is defendant-appellee as to that portion of the Judgment (A 270)* rendered below by Judge Thomas P. Griesa dismissing plaintiffs' Amended Complaint against it without leave to replead.

Issues Presented

Did the Court below correctly exercise its discretion to dismiss *sua sponte* the Amended Complaint as against Disclosure?

* All references designated "A" are to pages of the Joint Appendix on this appeal.

Appendix II

The Nature of the Case and Proceedings Below

On June 27, 1974, plaintiff Samuel H. Sloan commenced this action by filing a Complaint against the Securities and Exchange Commission (the "S.E.C.") seeking an order adjudging the Securities Exchange Act of 1934 and the rules promulgated thereunder unconstitutional, and an order directing that Sloan be "permitted to list any security by name in the pink sheets" and "to buy and sell any security." (A 8). At a pretrial conference held on September 18, 1974, plaintiff Samuel H. Sloan was directed to amend his Complaint by October 2, 1974, so as to cure the vagueness and lack of specificity of the original Complaint. (A 16). Pursuant to an Order granting plaintiff Samuel H. Sloan an extension of time in which to file his Amended Complaint, the current appellants Samuel H. Sloan and Samuel H. Sloan & Co. (hereinafter jointly referred to as "Sloan") filed their Amended Complaint on October 22, 1974. The Amended Complaint named six new defendants including Disclosure.

Of the forty pages and three hundred and nine paragraphs of the Amended Complaint, the allegations against and references to Disclosure number six. (A 28, ¶ 11; A52, ¶ 213; A 53, ¶s 214 and 215; A 61, ¶ 290; and A 63, ¶ 297). As against Disclosure the Amended Complaint purports to state claims arising under Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act (15 U.S.C. §§ 1, 2 and 14 respectively) and seeks damages of \$100,000. Disclosure has a contract with the SEC, pursuant to which Disclosure is given the exclusive right to perform mail order duplicating and copying services. The gravamen of plaintiffs' contentions as against Disclosure appears to be that Disclosure's contract with the S.E.C. constitutes a monopoly, the existence of which has injured Sloan because of the allegedly "excessive rates" charged. [A 53].

Appendix II

Disclosure served an Answer [A 113 *et seq.*] admitting that it has a contract with the Office of Records and Services of the S.E.C., denying liability and asserting the affirmative defense that the Amended Complaint failed to state a claim as to Disclosure upon which relief could be granted.

During a pre-trial conference held on January 10, 1975, a number of defendants indicated their intention to move for dismissal of the Amended Complaint. By January 31, 1975, various motions to dismiss were filed and plaintiff filed various motions. A hearing as to all motions was held on February 14, 1975, and the Court denied all plaintiffs' motions, granted all defendants' motions and dismissed the Amended Complaint as to Disclosure, *sua sponte* [A 271 *et seq.*]. Judgment was entered on February 26, 1975. Subsequently, plaintiffs' motion for reargument was denied on February 28, 1975.

Summary of Argument

1. Sloan has failed to allege the basic facts constituting the requisite elements of a cause of action under the stated sections of the Antitrust Laws as against Disclosure.
2. Sloan has not named Disclosure as a defendant for any reason other than to provide a basis for his allegations against the S.E.C. and Sloan concedes this as a fact.

ARGUMENT**I. The Amended Complaint Fails to State a Claim Upon Which Relief Can be Granted.**

If it is conceded, *arguendo*, that Disclosure is a proper party to the action, the sole issue on this appeal is whether

Appendix II

the Court below correctly dismissed the Amended Complaint. We contend that on the law and the facts dismissal was proper on the grounds that the alleged claim is frivolous and that the Amended Complaint fails to state a claim upon which relief can be granted.

The Court below has the power to make and grant motions to dismiss *sua sponte* premised on the legal inadequacy of a complaint. *Literature, Inc. v. Quinn*, 482 F.2d 372 (1st Cir. 1973); *Robins v. Rarback*, 325 F.2d 929 (2d Cir. 1963) *cert. denied*, 379 U.S. 974 (1965); 5 Wright & Miller, *Federal Practice and Procedure: Civil* § 1357, at 593-594. Moreover, where subject matter jurisdiction is premised on Federal questions, a court may on its own motion, dismiss a complaint where that complaint fails to state facts sufficient to invoke jurisdiction under the premised Federal question. *Miclau v. Miclau*, 58 F.R.D. 207 (D. Puerto Rico 1972); *Foster v. National Biscuit Co.*, 31 F. Supp. 552 (W.D. Wash., N.D. 1940). Such was the situation below and, in the premises, Judge Griesa ruled appropriately.

A. Congressional Mandate Exempts Disclosure's Contract with the SEC from the Antitrust Laws

The antitrust laws are aimed at private, not governmental action. *Parker v. Brown*, 317 U.S. 341, 350-352 (1943); *E. W. Wiggins Airways Inc. v. Mass. Port Authority*, 362 F.2d 52, 55-56 (1st Cir.), *cert. denied*, 385 U.S. 947 (1966). Thus, when "person" is defined under these laws, the United States government is not included (see 15 U.S.C. §§ 8, 12). Consequently, when government agents and agencies act within the scope of their authority and pursuant to government policy or legislative enactment, the resultant contracts, etc. are immune from potential liability under the antitrust laws. *Parker v. Brown*, *supra*;

Appendix II

Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561, 576-577 (10th Cir. 1961), *cert. denied sub nom Wade v. Union Carbide & Carbon Corp.*, 371 U.S. 801 (1962).

Disclosure's contract with the S.E.C. states on its face that it was entered into pursuant to the provisions of 41 U.S.C. § 252(c)(10) relating to the procurement by the government of property and services by purchase and/or contract. In addition, 41 U.S.C. § 252(a), as it then existed, provided in relevant part as follows:

"The provisions of this chapter shall be applicable to purchases and contracts for property or services made by—

(1) The General Services Administration, for the use of such agency or otherwise; or

(2) any other executive agency (except the departments and activities specified in section 2303(a) of Title 10) in conformity with authority to apply such provisions delegated by the Administrator in his discretion. Notice of every such delegation of authority shall be furnished to the General Accounting Office."

As the Section of Antitrust Law of the American Bar Association stated in its recent commentary *Antitrust Law Developments* (1975):

"When . . . a state by valid legislative action adopts a policy restricting competition in an industry vital to its interests and substitutes a system of public regulation which specifically requires a trade restraint, the regulatory program does not conflict with the Sherman Act." (at 408).

Clearly, in the instance of the acquisition of products and services by governmental agencies, Congress recognized

Appendix II

the necessity of prescribing the means by which contracts for such goods and services should be entered into. Hence, by valid legislation, Congress authorized the making of the S.E.C.-Disclosure contract and thereby created an antitrust exemption for Disclosure.

B. Disclosure's Contract with the S.E.C. Does Not Constitute an Unlawful Restraint of Trade

Assuming, *arguendo*, that Disclosure's contract with the S.E.C. is not exempt from the antitrust laws, appellants have failed to allege facts constituting an illegal and prohibited restraint of trade. In the absence of such allegations, the Complaint against Disclosure must fall.

Section 1 of the Sherman Act (15 U.S.C. § 1) reads, in pertinent part as follows:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations is declared to be illegal. . . ."

The operative words of this section are ". . . in restraint of trade or commerce" and it has been held that the anticompetitive effect and the surrounding circumstances of allegedly violative agreements are the determinative elements of this section. Thus, Section 1 of the Sherman Act does not prohibit all agreements which may restrain trade—every contract being in restraint of trade—but only those which are *unreasonable* by virtue of having a pernicious effect on competition and which have no redeeming virtue. *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967); *Standard Oil Co. v. U.S.*, 221 U.S. 1 (1911). Therefore, the Amended Complaint must also allege that the restraint of trade complained of is unreasonable and must further demonstrate an alleged anticompetitive effect.

Appendix II

Sloan has not asserted that the activities of Disclosure pursuant to its contract with the S.E.C. are in restraint of trade much less an unreasonable restraint of trade, nor has Sloan alleged that potential or actual competitors have been hindered or otherwise barred from lawful competition. Appellants themselves concede that the S.E.C. makes its materials available to the public for reproduction in its own local offices—and at a lower price! Appellants Brief, p. 46. In fact, those who file various documents with the S.E.C. are the entities with the ultimate control over those materials. Disclosure's contractual rights have no effect whatsoever on the ability of appellants to obtain copies of the desired materials from their original source—those who filed them with the S.E.C. in the first instance. In sum, Disclosure's contract with the S.E.C. is roughly analogous to an exclusive agency or dealership. Such arrangements are not *per se* illegal and have been held valid where other sources of supply are open to the complaining party and where that party is not the target of a conspiracy of his competitors. *Beckman v. Walter Kidde & Co.*, 316 F. Supp. 1321 (E.D.N.Y. 1970), *aff'd*, 451 F.2d 593 (2d Cir. 1971), *cert. denied*, 408 U.S. 922 (1972); see also *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1957). In the case at bar, the result should be no different.

C. Disclosure's Contract with the S.E.C. Does Not Constitute Unlawful Monopolization

Section 2 of the Sherman Act (15 U.S.C. § 2) provides in pertinent part as follows:

"Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be guilty of a misdemeanor . . ."

Appendix II

This section therefore proscribes the process of monopolization, conspiracies to monopolize and attempts to monopolize.

Conceding, *arguendo*, that Disclosure's contract with the S.E.C. may constitute a monopoly, appellants have still failed to allege the requisite elements of a valid cause of action under this section. The United States Supreme Court has held that the offense of monopolization consists not merely of the possession of monopoly power but also the "willful acquisition . . . maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident" *United States v. Grinnell Corp.*, 384 U.S. 563, 570-571 (1966).

Moreover, monopoly power as defined under Section 2 has been held as "the power to control market prices or exclude competition," *United States v. Grinnell Corp.*, *supra*, at 571, "coupled with a purpose or intent to do so." *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 174 (1948). Hence, in *American Tobacco Co. v. United States*, 328 U.S. 781, 811 (1946), the United States Supreme Court stated:

" . . . the material consideration in determining whether a monopoly exists is not that prices are raised and that competition is excluded but that power exists to raise prices or to exclude competition when it is desired to do so."

Since Disclosure operates under a contract with the S.E.C. which is finite in time, it, therefore, has no power to raise prices or to exclude competition save by the specific terms* of that contract. Moreover, in order to measure any ability

* Appellants in fact concede that it is the S.E.C. which sets the rates of which they make complaint [Appellants' Brief, p. 46].

Appendix II

to lessen or destroy competition, it is necessary to determine the relevant market—either product or geographic—over which the alleged monopoly power exists. *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 177 (1965).

Appellants here have failed to allege what the courts have held to be three necessary allegations of a claim of monopolization: a relevant market, Disclosure's control of that market or even the activity monopolized. *United States v. Grinnell Corp.*, *supra*; *U.S. v. E. I. Du Pont De Nemours & Co.*, 351 U.S. 377, 389, 394 (1956); *Karlinsky v. New York Racing Ass'n, Inc.*, 310 F. Supp. 937 (S.D.N.Y. 1970). While the failure to allege a relevant market may not be, in and of itself, a fatal defect in the Amended Complaint furnishing sufficient grounds for dismissal, the absence of any allegation of power to control prices and exclude competition has been held to be so fatally defective. *Keco Industries Inc. v. Borg-Warner Corp.*, 334 F. Supp. 1240, 1245-1246 (M.D. Pa. 1971). Taken cumulatively, however, all the pleading deficiencies mandate, much less allow, dismissal of the complaint and affirmance of the judgment of the lower court.

D. Disclosure's Contract with the S.E.C. Is Not Within the Parameters of Section 3 of the Clayton Act

Section 3 of the Clayton Act (15 U.S.C. § 14) reads as follows:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia

Appendix II

or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

By its terms, that section prohibits restrictive and exclusive dealing agreements which restrict competition by means of requiring the buyer to agree not to use the goods or commodities of the seller's competitors. Merely stating the provisions of the section demonstrates its inapplicability to the facts presented in the complaint herein. Moreover, it has been held that this section, by its terms, is inapplicable to agreements for services. *MDC Data Centers, Inc. v. International Business Machines Corp.*, 342 F. Supp. 502, 504 n.2 (E.D. Pa. 1972). Since Disclosure's contract with the S.E.C. is admittedly one for services, the Amended Complaint fails to state a cause of action under the Clayton Act and must fall.

E. Appellants Lack Standing to Sue

Section 4 of the Clayton Act (15 U.S.C. § 15) provides in relevant part as follows:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent . . ."

Appendix II

In order for Sloan to properly sue and claim damages from Disclosure under this Section, they must allege that they have sustained injury in their business or property as a proximate result of the particular acts of which they complain. This Court has held that in order to have standing under this section a plaintiff must be within the "target area" of the alleged violations; *i.e.*, plaintiff must be the person against whom the conspiracy is aimed, such as a competitor of the person sued. *Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292 (2d Cir. 1971), *cert. denied* 406 U.S. 930 (1972); *Billy Baxter, Inc. v. Coca-Cola Co.*, 431 F.2d 183 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971). The injury must also be a direct rather than incidental result of the alleged antitrust violation. *SCM v. Radio Corp. of America*, 276 F. Supp. 373 (S.D.N.Y. 1967), *aff'd*, 407 F.2d 166 (2d Cir.), *cert. denied*, 395 U.S. 943, *reh. denied*, 396 U.S. 869 (1969).

Sloan did not allege that they are the persons against whom the alleged violations are aimed. Nor do they allege that they are engaged in the business of reproducing materials or documents. [A 26-27, ¶s 3 & 4]. Indeed, Sloan did not ever allege that he has suffered any damages by reason of the contract or its allegedly "excessive rates." Appellants allege only the existence of what they characterize as "excessive rates." Hence, appellants have no standing to bring suit against Disclosure by reason of alleged violations of the antitrust laws and the Amended Complaint was properly dismissed.

II. Appellants Concede That Disclosure Is Not a Real Party Defendant.

One basic and undeniable fact of this appeal is that Sloan concedes in his brief to this Court that it is the S.E.C.

Appendix II

alone against which he allegedly has a complaint. While stating that Disclosure is not a "tag along" party, Sloan proceeds to demonstrate by his argument that this is precisely the case. Sloan states that Disclosure's activities (performing its contractual obligations?) "constitute an intergal (sic) part of a reprehensible scheme to expand the power of the S.E.C. at the expense of individuals such as Sloan." Appellants' Brief, p. 46. Moreover, Sloan attacks the S.E.C., not Disclosure, for allegedly legislating by requiring the payment of a fee of \$.15 per page for the duplication of documents. Hence, it appears that it is not even the amount of the fee to which Sloan takes exception but the existence of any fee at all! This argument is immediately followed by the assertion of the importance of appellants' case against Disclosure, buttressed by the recitation of the undisputed facts that the reproduction of all the documents annually filed with the S.E.C. amounts to substantial sums. Clearly, the end result of this reasoning is nonsensical. Sloan would apparently have the S.E.C. maintain its own duplicating facilities to provide copies to the public—presumably free of charge to the recipient but at the taxpayer's cost. Regardless of whether Sloan's desires are practical or reasonable, the fact that the S.E.C. does not operate in accordance with them, but by means of a contract with Disclosure, is not a proper basis for a claim against Disclosure.

Finally, Sloan admits that the only reason Disclosure is a party to this action is that the "broad thrust of this lawsuit involves the question of the constitutionality of the power of the S.E.C. to regulate and suspend trading in securities." Appellants' Brief, p. 47. By a grossly circuitous line of reasoning, appellants then arrive at the conclusion that Disclosure is a necessary party because it provides the means of distributing to the public information filed with

Appendix II

the S.E.C., which distribution is the purpose of the S.E.C.'s filing requirement. Ultimately, appellants' claim is that Disclosure is a named defendant because it would be adversely affected by a court ruling in favor of appellants. This argument of the "necessity" of Disclosure as a party was raised in appellants' motion for reargument in the Court below. Judge Griesa rejected that argument.

The fact is that of appellants' sixty-eight page brief only approximately four pages are devoted to Sloan's claims against Disclosure, and in those pages [Appellants' Brief, pp. 45-48] appellants fail to set forth any substantive claim. This fact is a product of neither inadvertence nor lack of ingenuity, but rather indicates the correctness of Judge Griesa's finding that the claims against Disclosure were frivolous and warranted dismissal of the Amended Complaint.

CONCLUSION

The judgment of the District Court should be affirmed as to Disclosure Inc.

Respectfully submitted,

WILLKIE FARR & GALLAGHER
Attorneys for Defendant-Appellant
Disclosure Inc.

Office and P. O. Address

One Chase Manhattan Plaza
New York, New York 10005
(212) 248-1000

MICHAEL B. TARGOFF

PATRICIA ANNE WILLIAMS,

Of Counsel.

AUG 17 1976

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-58

SAMUEL H. SLOAN, SAMUEL H. SLOAN & CO.,
Petitioners
v.

SECURITIES & EXCHANGE COMMISSION, UNITED STATES
OF AMERICA as the SECURITIES AND EXCHANGE COM-
MISSION, NATIONAL QUOTATION BUREAU, INC.,
BUNKER RAMO CORP., NATIONAL ASSOCIATION OF
SECURITIES DEALERS, INC., DISCLOSURE INC.,
NATIONAL CLEARING CORP., *Respondents*

On Writ of Certiorari to the United States Court of Appeals
for the Second Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION
NATIONAL ASSOCIATION OF SECURITIES
DEALERS, INC., BUNKER RAMO CORP.,
NATIONAL CLEARING CORP.

FRANK J. WILSON
General Counsel
National Association of
Securities Dealers, Inc.

ROBERT J. WOLDOW
General Counsel
JEFFREY M. SILOW
Attorney
National Clearing Corp.

1735 K Street, N. W.
Washington, D. C. 20006
Counsel For Respondents
In Opposition National
Association of Securities
Dealers, Inc., Bunker Ramo
Corp., National Clearing Corp.

August, 1976

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	2
Statement of the Case	3
Argument	5
Conclusion	20
Appendices:	
A. The Maloney Act, 15 U.S.C. § 78o-3	1a
B. Exchange Act Rule 15Aj-2, 17 C.F.R. 240.15Aj-2	14a
C. Exchange Act Rule 15Aj-3, 17 C.F.R. 240.15Aj-3	16a

CITATIONS

CASES:

<i>Gordon v. New York Stock Exchange</i> , 422 U.S. 659 (1975)	6, 12, 17, 18, 19
<i>Harwell v. Growth Programs</i> , 451 F.2d 240 (5th Cir. 1971), <i>reh. den.</i> 459 F.2d 461, <i>cert. den.</i> 409 U.S. 876 (1972)	9, 10, 18
<i>In the Matter of National Association of Securities Dealers, Inc.</i> , 20 S.E.C. 508 (1945)	9
<i>In re National Association of Securities Dealers, Inc.</i> , 5 S.E.C. 627 (1939)	7
<i>International Association of Machinists v. Street</i> , 367 U.S. 740 (1961)	9

	Page
<i>National Association of Securities Dealers, Inc., Exchange Act Release No. 96-32 (June 7, 1972), aff'd sub nom. <i>National Association of Securities Dealers, Inc. v. Securities and Exchange Commission</i>, 486 F.2d 1314 (C.A.D.C. 1973)</i>	13
<i>Ricci v. Chicago Merchantile Exchange</i> , 409 U.S. 289 (1973)	17, 18
<i>R. H. Johnson & Co. v. Securities and Exchange Commission</i> , 198 F.2d 690 (2d Cir. 1952)	18
<i>Silver v. New York Stock Exchange</i> , 302 F.2d 714 (2d Cir. 1962), <i>rev'd</i> 373 U.S. 341 (1963)	9, 17, 18
<i>Thill Securities Corporation v. New York Stock Exchange</i> , 433 F.2d 264 (7th Cir. 1970), <i>cert. den.</i> 401 U.S. 994 (1971)	16, 18
<i>United States v. National Association of Securities Dealers, Inc.</i> , 422 U.S. 694 (1975)	6, 12, 13, 17, 18, 19
<i>United States v. Morgan</i> , 118 F. Supp. 621 (S.D.N.Y. 1953)	9
<i>United States v. Socony-Vacuum Oil Co.</i> , 310 U.S. 150 (1940)	9
 STATUTES:	
The Securities Exchange Act of 1934, 15 U.S.C. §§ 78a <i>et seq.</i>	<i>Passim</i>
The Securities Acts Amendments of 1975, Pub. L. 94-29, 15 U.S.C. §§ 78a <i>et seq.</i>	<i>Passim</i>
The Maloney Act, 15 U.S.C. § 78o-3	<i>Passim</i>
15 U.S.C. § 78a	3
15 U.S.C. § 78o-3(b)	4, 10, 14
15 U.S.C. § 78o-3(b)(8)	7, 12, 14
15 U.S.C. § 78o-3(b)(9)	13
15 U.S.C. § 78o-3(b)(10)	13
15 U.S.C. § 78o-3(b)(12)	7, 13-14

	Page
15 U.S.C. § 78o-3(d)	14
15 U.S.C. § 78o-3(e)	10
15 U.S.C. § 78o-3(g)	13
15 U.S.C. § 78o-3(h)	10, 13
15 U.S.C. § 78o-3(h)(2)	14
15 U.S.C. § 78o-3(i)	10
15 U.S.C. § 78o-3(i)(1)	8
15 U.S.C. § 78o-3(j)	11
15 U.S.C. § 78o-3(k)	11, 13
15 U.S.C. § 78o-3(n)	9, 10
15 U.S.C. § 78o-3(y)	13
15 U.S.C. § 78y(a)	15, 16
15 U.S.C. § 78o-3(b)(6) as amended by the Securities Acts Amendments of 1975	8
15 U.S.C. § 78o-3(b)(11) as amended by the Securities Acts Amendments of 1975	8
15 U.S.C. § 78o-3(e) as amended by the Securities Acts Amendments of 1975	8
28 U.S.C. § 1254(1)	2
52 Stat. 1070 (1938)	6
 OTHER AUTHORITIES:	
S. Rep. No. 94-75, 94th Cong. 1st Sess. (1975)	8, 10, 11, 18
II L. Loss, <i>Securities Regulation</i> , Ch. 8C § 3 (2 Ed. 1961)	9
17 C.F.R. 240.15Aj-2	14, 15
17 C.F.R. 240.15Aj-3	15-16

IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

No. 76-58

SAMUEL H. SLOAN, SAMUEL H. SLOAN & CO.,
Petitioners
v.

SECURITIES & EXCHANGE COMMISSION, UNITED STATES
OF AMERICA as the SECURITIES AND EXCHANGE COM-
MISSION, NATIONAL QUOTATION BUREAU, INC.,
BUNKER RAMO CORP., NATIONAL ASSOCIATION OF
SECURITIES DEALERS, INC., DISCLOSURE INC.,
NATIONAL CLEARING CORP., *Respondents*

On Writ of Certiorari to the United States Court of Appeals
for the Second Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION
NATIONAL ASSOCIATION OF SECURITIES
DEALERS, INC., BUNKER RAMO CORP.,
NATIONAL CLEARING CORP.

OPINIONS BELOW

The decision of the United States District Court for
the Southern District of New York is included as
Appendix D of the Petition. The opinion of the United
States Court of Appeals for the Second Circuit (App.

A of Petition) is reported at slip op. 2377 (No. 75-7283, 2d Cir. March 4, 1976). The order of the United States Court of Appeals for the Second Circuit amending the opinion of March 4, 1976 and denying the Petition for Rehearing is included as Appendix B of the Petition; the order of the United States Court of Appeals for the Second Circuit denying the Suggestion That The Rehearing Be In Banc is included as Appendix C of the Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on March 4, 1976. The opinion of the Court of Appeals was amended and a Petition For Rehearing was denied on April 16, 1976; the Suggestion That The Rehearing Be In Banc was also denied on the same date. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether primary and exclusive jurisdiction over the subject matter of the Complaint lies with the Securities and Exchange Commission?
2. Whether the actions of respondents, National Association of Securities Dealers, Inc., Bunker Ramo Corp. and National Clearing Corp. are exempt from application of the antitrust laws?

STATUTE INVOLVED

The statutory provisions involved are contained in Section 15A of the Securities Exchange Act of 1934, 15 U.S.C. § 78o-3, commonly known as the "Maloney Act"

of 1938, as amended prior to June 4, 1975.¹ The Maloney Act is printed in Appendix A, *infra*, pp. 1a-13a.

STATEMENT OF THE CASE

On October 22, 1975, Petitioners, Samuel H. Sloan and Samuel H. Sloan & Co., ("Petitioner"), filed an Amended Complaint in the United States District Court for the Southern District of New York naming, among others, as additional defendants, the National Association of Securities Dealers, Inc. ("NASD"), Bunker Ramo Corporation ("Bunker Ramo") and National Clearing Corporation ("NCC"), collectively, "Respondents", to the action against the Securities and Exchange Commission (the "Commission").

The Amended Complaint alleged that certain actions taken by Respondents violated the antitrust laws, in addition to making numerous frivolous allegations including violations of the antifraud provisions of the Exchange Act and/or of the Common Law. Those alleged actions of Respondents, which were taken pursuant to the direct mandate of the pervasive regulatory scheme of the Securities Exchange Act of 1934 (the "Exchange Act"), and which were claimed by Petitioner to violate the antitrust laws, related to qualifications for initial and continued participation in the NASD's automated quotation system, NASDAQ, and membership in the NASD's securities clearance sub-

¹ On June 4, 1975, the Securities Act Amendments of 1975 (the "1975 Amendments"), Pub. L. No. 94-29 as codified in 15 U.S.C. §§ 78a (Supp. 4, 1975), amended the Maloney Act. Since the supposed actions of which Petitioner complains allegedly occurred prior to June 4, 1975, all references are to the Securities Exchange Act of 1934 prior to said date unless otherwise stated.

sidiary, NCC. See Section 15A(b), 15 U.S.C. § 78o-3(b).

The jurisdiction of the District Court was incorrectly invoked by Petitioner since the proper forum for the deliberation of the subject matter of the Complaint, as held by the District Court, was primarily and exclusively with the Commission.

On February 14, 1975, after oral argument, the District Court granted the Securities and Exchange Commission's motion to dismiss as to all defendants.²

On February 27, 1975, judgment was entered by the Clerk of the District Court dismissing the Complaint as to all defendants without leave to replead (App. E of Petition).

On February 24, 1975, however, Petitioner filed a Notice of Motion for Reargument alleging that, among other things, the action of the District Court foreclosed the avenues for redress of his grievances.

On March 4, 1975, Respondents filed a Notice of Motion In Opposition to Plaintiff's Motion for Reargument with an accompanying Memorandum In Support.

² Respondents joined in motions to dismiss since it appeared that the central issue in the Complaint was directed at actions taken either jointly or separately by the Respondents in accordance with the regulatory responsibilities (pursuant to the Maloney Act) of the NASD, a registered national securities association. NCC, the wholly owned subsidiary of the NASD, provides securities clearance and settlement services to NASD members and other entities. Bunker Ramo was the owner and operator of the NASD's automated quotation system ("NASDAQ"), which was developed at the direction of and operated under the regulation and control of the NASD. On February 9, 1976 the NASD purchased NASDAQ system and contracted with Bunker Ramo to continue to operate said system.

On April 1, 1975 the District Court endorsed an Order denying the Motion for Reargument.

On March 28, 1975 Petitioner filed a Notice of Appeal to the United States Court of Appeals for the Second Circuit.

After submission of Briefs and upon oral argument held February 19, 1976, the Court of Appeals, on March 4, 1976, affirmed the judgment of the District Court.³ (App. A of Petitioner). On April 16, 1976, the Court of Appeals amended its opinion and denied a Petition For Rehearing (App. B of Petition); the Suggestion That The Rehearing Be In Banc was denied on the same date (App. C of Petition).

The Petition For A Writ of Certiorari To The United States Court Of Appeals For The Second Circuit was filed on July 15, 1976.

ARGUMENT

The Petitioner has argued that the NASD, Bunker Ramo and NCC have taken actions which are violative of the antitrust laws and the antifraud provisions of the Exchange Act and the common law. The courts below have correctly recognized that these actions were taken pursuant to the regulatory mandate and scheme of the Maloney Act (App. A of Petition, p. 5a; App. D of Petition, p. 16a). As such, the Court of Appeals held that none of the actions charged constituted antitrust violations (App. A of Petition, p. 5a). Additionally, as was evidenced in the courts below, pursu-

³ The Court of Appeals, noting Petitioners broadside attack upon the entire structure of securities regulation in the United States, agreed with the District Court that the "attack is frivolous". (App. A of Petition, p. 4a)

ant to the Congressionally prescribed regulatory scheme, the proper forum for the deliberation of the subject matter of the Complaint is primarily and exclusively the Securities and Exchange Commission.

Petitioner's allegations and history of similar litigious conduct leaves no doubt that, upon the facts of this case, the characterization as "frivolous" by the Court of Appeals of the challenged legality of the entire structure of securities regulation in the United States must be manifestly correct (App. A of Petition, p. 4a). The law is settled and there is no asserted conflict of legal decision nor in light of the legislative history of the Exchange Act, which includes the 1975 Amendments, could any other result have been reached. Thus, there is no important question of federal law requiring decision by this Court.

I.

The Decision Below Is Correct

NO VIOLATION OF THE ANTITRUST LAWS.

The Court of Appeals, citing generally two recent decisions of this Court,⁴ held that ". . . none of the actions charged constitute antitrust violations essentially because they were taken pursuant to the scheme of securities regulation established by the Securities Exchange Act of 1934."

The Exchange Act was amended in 1938 to add the Maloney Act. 52 Stat. 1070 (1938). The regulatory features of the Maloney Act were to be effectuated through self-regulation by over-the-counter brokers

⁴ *United States v. National Association of Securities Dealers, Inc.*, 422 U.S. 694 (1975) and *Gordon v. New York Stock Exchange*, 422 U.S. 659 (1975).

and dealers. The vehicle envisioned by Congress in order to so carry out industry self-regulation was a securities association registered with and under the supervision of the Securities and Exchange Commission. The NASD is the only national securities association which has been registered. *In re National Association of Securities Dealers, Inc.*, 5 S.E.C. 627 (1939).

To qualify for registration, a national securities association must satisfy the comprehensive requirements of, among other things, Section 15A(b)(8), 15 U.S.C. § 78o-3(b)(8). This section provided that the rules of a national securities association must be designed:

. . . to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to provide safeguards against unreasonable profits or unreasonable rates or commissions or other charges, and, in general, to protect investors and the public interest, and to remove impediments to and perfect the mechanism of a free and open market; and are not designed to permit unfair discrimination between customers, or issuers, or brokers or dealers, to fix minimum profits, to impose any schedule of prices or to impose any schedule of fixed minimum rates or commissions, allowances, discounts, or other charges.

Additionally, Section 15A(b)(12), 15 U.S.C. § 78o-3(b)(12), stated:

The rules of the association include provisions governing the form and content of quotations relating to securities sold otherwise than on a national securities exchange which may be distributed or published by any member or person associated with a member, and the persons to whom such quotations may be supplied. Such rules

relating to quotations shall be designed to produce fair and informative quotations, to prevent fictitious or misleading quotations, and to promote orderly procedures for collecting, distributing and publishing quotations . . .

In order to effectuate these requirements, Section 15A(i)(1), 15 U.S.C. § 78o-3(i)(1) provided that:

The rules of a registered securities association may provide that no member thereof shall deal with any non-member broker or dealer . . . except at the same prices, for the same commissions or fees, and on the same terms and conditions as are by such member accorded to the general public.

Congress has recently restated its intent in the 1975 Amendments⁵ as follows:

. . . a self-regulatory organization must be able to prevent an unqualified person from obtaining access to facilities and business opportunities by denying membership. And members transactions with non-members must be regulated, as the Supreme Court pointed out in the *Silver* case, in order that ". . . contact with an unreliable non-member [does not] injure the member or the member's customer on whose behalf the contract is made and [thus] ultimately imperil the future status of [the self-regulatory organization] by sapping public confidence. S. Rep. No. 94-75 at 24.

⁵ This is especially important since the NASD's undertaking to regulate its membership is not discretionary with respect to persons qualified for membership. If a person meets the requirements for membership contained in the Maloney Act, the persons must be admitted. S. Rep. No. 94-75, 94th Cong. 1st Sess. (1975) at 24.

It should be noted that the Maloney Act, as it has been amended by the 1975 Amendments, retains substantially the same requirements as it contained prior to June 4, 1975. See section 15A(b) (6), Section 15A(b)(11) and Section 15A(e).

Petitioner's contention that the exclusionary policy of the NASD in permitting only NASD members to subscribe to Level III of NASDAQ violates the anti-trust laws must fail in light of the statutory mandate above. The Maloney Act requires that the NASD regulate the business conduct of its membership, including member/non-member relationships on NASDAQ.

Congress recognized that this statutory scheme for regulation could conflict with other federal statutes and provided in Section 15A(n) of the Maloney Act, 15 U.S.C. § 78o-3(n), that:

[i]f any provision of this section is in conflict with any provision of any law of the United States in force on the date this section takes effect, the provisions of this section shall prevail.

The courts, commentators and the Securities and Exchange Commission⁶ have stated that this section, under certain circumstances, acts to exempt Association rules when such have been required by the Exchange Act and reviewed by the Securities and Exchange Commission. While the section has recently been removed from the Maloney Act by the 1975 Amendments, Congress has stated in this regard:

[I]n light of the anomalous absence of a similar provision with respect to national securities ex-

⁶ *Harwell v. Growth Programs*, 451 F.2d 240 (5th Cir., 1971), *reh. den.* 459 F.2d 461 *cert. den.* 409 U.S. 876 (1972); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) [n. 60 in Justice Douglas' opinion p. 227]; *International Association of Machinists v. Street*, 367 U.S. 740 (1961) [n. 16 in Justice Frankfurter's dissenting opinion, p. 809]; *United States v. Morgan*, 118 F. Supp. 621, 693 (S.D.N.Y. 1953); *Silver v. New York Stock Exchange*, 302 F.2d 714 (2d Cir. 1962) *rev'd* 373 U.S. 341 [Judge Waterman's dissenting opinion, p. 722]; *In the Matter of the National Association of Securities Dealers, Inc.*, 20 S.E.C. 508 (1945); See Also II L. Loss, *Securities Regulation*, Ch. 8C(2d Ed. 1961) at pp. 1369-1370.

changes and the prevailing case law interpreting the Section (e.g. *Harwell v. Growth Programs*) the Committee decided to delete the provision as superfluous and unnecessary.

The deletion of Section 15A(n) is not intended to change existing law with respect to the relationship between antitrust and securities laws nor is any other provision of S. 249 intended to change that relationship. S. Rep. No. 94-75 at 14.

In the face of this express exemption from the antitrust laws for actions taken by Respondents as required by the regulatory scheme of the Maloney Act, under the pervasive and potent oversight of the Commission, the Court of Appeals properly affirmed the decision of the District Court.

Even if a claim of express exemption were not available, the affirmation of the lower court's decision must stand as correct under the standards enunciated by this Court in finding implied repeal of the antitrust laws.

The Maloney Act, particularly the specific provisions contained within Section 15A(b),⁷ Section 15A(e),⁸ Section 15A(h),⁹ Section 15A(i)¹⁰

⁷ 15 U.S.C. § 78o-3(b) (See Appendix p. 1a, *infra*), relating to registration requirements for a national securities association under the Exchange Act.

⁸ 15 U.S.C. § 78o-3(e) (See Appendix p. 8a, *infra*), relating to the granting or denial of registration for a national securities association under the Exchange Act.

⁹ 15 U.S.C. § 78o-3(h) (See Appendix p. 9a, *infra*), relating to Commission review of disciplinary actions taken by the NASD.

¹⁰ 15 U.S.C. § 78o-3(i) (See Appendix p. 10a, *infra*), relating to membership restrictions of a national securities association.

and Sections 15A(j) and 15A(k),¹¹ directed that the NASD take certain actions and gave the Commission direct regulatory power and mandated positive action over NASD rules and practices with regard to the exclusionary actions alleged by the Petitioner. Under the statutory scheme, the Commission reviewed the rules of the NASD relating to the NASDAQ system, operated by Bunker Ramo, and its securities clearance system, operated by NCC, and "non-disapproved" them prior to their effectiveness.¹²

The pervasiveness of the regulatory scheme conferred by Congress upon the Commission relating to the practices of the NASD, its systems operator and clearing facility would effect an implied repeal of the antitrust laws. To deny antitrust immunity with respect to the narrow factual pattern presented by the Petitioner would be to subject the NASD and its members to conflicting standards. These conflicting standards would arise since the sole aim of antitrust legislation is to protect competition while the Commission's consideration includes, in addition to the protection of competition, the economic health of investors and the securities industry as well as the public in-

¹¹ 15 U.S.C. §§ 78o-3(j) and (k) (See Appendix p. 11a, *infra*), relating to the Commission's duty to alter, amend, supplement or abrogate the rules and practices of the NASD if necessary.

¹² The NASD and NCC have submitted their rules to the Commission for appropriate review and regulation under the Exchange Act since 1939 and 1971 respectively.

The duty of the Commission to act on rules proposals under the Maloney Act has been characterized by Congress as comprised of specific "affirmative and negative requirements." "Report of the Committee on Banking, Housing and Urban Affairs, United States Senate," S. Rep. No. 94-75, 94th Cong. 1st Sess. (1975).

terest. *Gordon v. New York Stock Exchange*, 422 U.S. 659 (1975).

Thus, if a conflict between the Exchange Act and the antitrust laws exists based upon the facts of this case, the antitrust laws must be displaced by the pervasive regulatory scheme to insure that the Exchange Act works and does not subject Respondents and their members to duplicative and inconsistent standards. *United States v. National Association of Securities Dealers, Inc.*, 422 U.S. 694 (1975).

Primary and Exclusive Jurisdiction Lies With the Securities and Exchange Commission

As indicated above, the Amended Complaint filed in the District Court naming the NASD, Bunker Ramo and NCC incorrectly invoked the jurisdiction of the District Court since the proper forum for deliberation of the subject matter of the Complaint is primarily and exclusively the Securities and Exchange Commission *supra* p. 4.

The District Court was manifestly correct in stating that Petitioner's method for challenge of the exclusionary rules and regulations of the Respondents was by resort to the Commission in the first instance and by further resort to the Court of Appeals. (App. D of Petition, p. 16a).

The Maloney Act, which was added to the Exchange Act in order “[t]o provide . . . a mechanism of regulation among over-the-counter brokers and dealers . . . [and] to prevent acts and practices inconsistent with just and equitable principles of trade . . .” 15 U.S.C. § 78o-3(b)(8), provided a procedure by which the regulations of a registered national securities association

could be challenged. The procedure was by way of a Petition to Abrogate filed by the Commission, with appeal to the United States Courts of Appeals. 15 U.S.C. § 78o-3(k); 15 U.S.C. § 78y.¹³ Comparable procedures were also provided by Congress in order to challenge disciplinary and other actions. 15 U.S.C. §§ 78o-3(b)(9), (10), (g) and (h); 15 U.S.C. § 78y.

The Commission, in accepting its responsibilities, has consistently taken the public position that an initial attack on an NASD rule is one “. . . over which the Commission is granted exclusive jurisdiction by Section 15A of the . . . Exchange Act . . .”. *United States v. National Association of Securities Dealers, Inc.*, 422 U.S. 694, 731 n. 43 (1975).

The registration requirements of the Maloney Act direct that the rules of a national securities association must contain provisions governing the form and content of quotations sold otherwise than on a national exchange:

. . . which may be disseminated by any member or any person associated with a member, and the persons to whom such quotations may be supplied . . . Such rules relating to quotations shall be designed to produce fair and informative quotations, both at the wholesale and retail level, to prevent fictitious or misleading quotations, and to promote orderly procedures for collecting and publishing quotations . . . [T]he Commission may, after notice and opportunity for hearing, suspend the

¹³ The Commission has specifically invoked this authority to abrogate. See *National Association of Securities Dealers, Inc.*, Securities Exchange Act Release No. 96-32 (June 7, 1972) *aff'd*, *National Association of Securities Dealers, Inc. v. Securities and Exchange Commission*, 486 F.2d 1314 (C.A.D.C. 1973).

registration of any association if it finds the rules thereof do not conform to the requirements of this subsection . . ., and any such suspension shall remain in effect until the Commission issues an order determining that such rules have been modified to conform with such requirements. Section 15A(b)(12), 15 U.S.C. § 78o-3(b)(12).

Changes in or additions to the rules of a national securities association could not become effective until the Commission was afforded an opportunity for review of the proposals under a Congressionally mandated obligation to disapprove them unless they were found to be consistent with the requirements of Sections 15A(b) and (d), 15 U.S.C. §§ 78o-3(b) and (d).

The Maloney Act requirements have been specifically applied to the NASDAQ system, which was developed, owned and operated by Bunker Ramo under the direction of, and in accordance with the By-laws and rules of the NASD by Exchange Act Rule 15Aj-2, 17 C.F.R. 240.15Aj-2.¹⁴ This rule directs that the standards enunciated in Sections 15A(b)(8), (12) and (h)(2) relating to the rules of a national securities association which must be designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market, and not permit unfair discrimination between customers or issuers, or brokers or dealers; to produce fair and informative quotations, to prevent fictitious or misleading quotations, and to assure that any disciplinary action pursuant to the rules shall not be excessive or oppressive, having due regard to the public interest be applied to the NASDAQ system.

¹⁴ Exchange Act Rule 15Aj-2 is printed in Appendix B, *infra*, pp. 14a-15a.

In addition, Rule 15Aj-2 required that the Association's rules must also provide a "fair and orderly procedure" with respect to excluding or limiting the access of any customer, issuer or broker or dealer. The requirement was also included for adherence to due process in any procedure so adopted and review of the Association's action by the Commission upon its own motion or upon application of the person aggrieved.

The NASD has adopted, as Article XVI of its By-laws, provisions in accord with Rule 15Aj-2 directing that members *and other persons* aggrieved by the application of NASDAQ "qualifications, criteria, standards and charges . . ." by the NASD or by the operation of the NASDAQ system by Bunker Ramo are entitled to a hearing and decision thereon by the NASD Board of Governors and thereafter, appeal to the Commission in accordance with the Maloney Act. Pursuant to Section 25(a) of the Exchange Act, 15 U.S.C. § 78y(a), appeal to the United States Court of Appeals of the Commission's final order is available.

Similarly, the Maloney Act requirements have been extended pursuant to Exchange Act Rule 15Aj-3, 17 C.F.R. 240.15Aj-3,¹⁵ and specifically applied to the NASD's clearing subsidiary, NCC. This rule, identical in its mandate to Rule 15Aj-2 discussed above, imposed a duty upon the NASD with respect to access to its operation of systems and facilities for clearance and settlement of securities:

Such rules shall also provide a fair and orderly procedure with respect to the determination of

¹⁵ Exchange Act Rule 15Aj-3 is printed in Appendix C, *infra*, pp. 16a-17a.

whether any customer or issuer or broker or dealer may be excluded or limited in respect of requested access to such system . . .

Again, promptly upon the effectiveness of Rule 15Aj-3, the NASD adopted Article XVII of its By-laws thereby providing members *and other persons* aggrieved by the "rules, qualifications, criteria, standards and charges . . ." applied by NCC or by the operation of the NCC system shall, in any case for which binding and final arbitration has not been provided by NCC rules,¹⁶ be entitled to a hearing and decision thereon by the NASD Board of Governors and thereafter, appeal to the Commission in accordance with the Maloney Act. Pursuant to Section 25(a) of the Exchange Act, 15 U.S.C. § 78y(a), appeal to the United States Courts of Appeals of the Commission's final order is available.

The Courts have set forth factors which may be considered in resolving the question of primary Commission jurisdiction in antitrust challenges to actions taken under the apparent authority of the Exchange Act. The effects of such actions on competition, the degree of actual review by the Commission and the extent to which the action is necessary to make the Exchange Act work may be considered. *Thill Securities Corp. v. New York Stock Exchange*, 433 F.2d 264 (7th Cir. 1970), *cert. den.* 401 U.S. 994 (1971). Additional determinants may be found if an aggrieved party may initiate Commission review of the action under a provision of the Exchange Act and if Commission expertise

¹⁶ The limitation as to grievances which must be submitted to arbitration would not be applicable to the exclusionary actions alleged herein.

is useful in resolving in the first instance whether the action is necessary to make the Exchange Act work. *Ricci v. Chicago Merchantile Exchange*, 409 U.S. 289 (1973).

Two recent cases in this Court, *Gordon v. New York Stock Exchange*, 422 U.S. 659 (1975) and *United States v. National Association of Securities Dealers, Inc.*, 422 U.S. 694 (1975), wherein the actions of the Exchange and the NASD, respectively, were found to be immune from antitrust challenges, indicate that a primary determination should be made not by the courts but by the Commission under its duty to oversee and insure the protection of competition under the Exchange Act as well as the protection of the investing public.

Thus, against the requirements of the Exchange Act, the actions of the NASD, Bunker Ramo and NCC must clearly be challenged primarily and exclusively with the Commission.

II.

There Is No Conflict of Decision

Petitioner asserts that the decision in the instant case is contrary to the decisions of the courts or of the administrative agency charged with responsibility for the regulatory scheme.

To buttress the assertion, cases are cited by Petitioner which do not differ with this case as to the law, but only as to principle. It is clear that the law regarding repeal of the antitrust laws in order to make the Exchange Act work is not in conflict with the decision at bar.

In Silver v. New York Stock Exchange, 373 U.S. 341 (1963) this Court noted, in upholding an anti-

trust challenge to an exchange rule that a different result might have been reached if exchange self-regulation were subject to the jurisdiction of the Commission and ultimately judicial review as is NASD self-regulation. 373 U.S. at 358 n. 12.

Congress recently extended the Commission's jurisdiction over the NASD to the exchanges and others under the 1975 Amendments and stated:

The Committee believes that the statutory pattern governing the scope of the NASD's authority is basically sound. This bill [S. 249] would extend the pattern now applicable to registered associations to exchanges. S. Rep. 94-75 at 27.

Applying the doctrines enunciated in *Silver* with the recognition of the Congressional intent in the passage of amendments to the Exchange Act, three United States Courts of Appeals and the United States District Court for the District of Columbia have had little difficulty in recognizing the importance of the Exchange Act prevailing over the antitrust laws when the provisions of the two are in conflict so that the statutory scheme for regulating the securities market may work.¹⁷

¹⁷ *Gordon v. New York Stock Exchange*, 422 U.S. 659 (1975); *R. H. Johnson & Co. v. Securities and Exchange Commission*, 198 F.2d 690 (2nd Cir. 1952) cert. den. 344 U.S. 855 (1952); *Harwell v. Growth Programs*, 451 F.2d 240 (5th Cir. 1971) reh. den. 459 F.2d 461 cert. den. 409 U.S. 876 (1972); *Thill Securities Corp. v. New York Stock Exchange*, 433 F.2d 264 (7th Cir. 1970) cert. den. 401 U.S. 944 (1971); See also *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289 (1973); *United States v. National Association of Securities Dealers, Inc.*, 422 U.S. 694 (1975).

The Commission has fully accepted its responsibilities in this area and has voiced its agreement with the decisions relating thereto, *supra*, p. 13.

The Court below in the instant case held:

[T]he other . . . branch of Sloan's complaint . . . charges the various non-governmental defendants with violations of the Sherman and Clayton Acts. But none of the actions charged constitute antitrust violations, essentially because they were taken pursuant to the scheme of securities regulation established by the Securities Exchange Act of 1934. (App. A of Petition, p. 5a)

There is no conflict of decision in this case. *Gordon v. New York Stock Exchange*, 422 U.S. 659 (1975); *United States v. National Association of Securities Dealers, Inc.*, 422 U.S. 694 (1975).

III.

There Is No Important Question of Federal Law

Petitioner insists, however, that the challenge mounted here as to the legality of the entire structure of securities regulation in the United States is an important question of federal law which this Court should settle. This assertion flies in the face of the characterizations by the District Court and Court of Appeals that such an attack is frivolous. (App. A of Petition, p. 4a; App. D of Petition).

It is well settled that government regulation of the securities industry is an accepted exercise of authority by the Congress in order to protect the economic health of the markets and the public. The Commission and the self-regulatory organizations directly derive their responsibilities pursuant to Congressional mandate. Petitioner must be charged with the knowledge that

he chose to operate in a closely regulated field in which the public interest and public policy play a dominant part.

The mere framing of a question on a grand scale, the setting out of irrational allegations in pseudo-legalistic form¹⁸ or the listing of variances in principle among the holdings of the courts does not make an important federal question.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari be denied.

Respectfully submitted,

FRANK J. WILSON
General Counsel
*National Association of
Securities Dealers, Inc.*

ROBERT J. WOLDOW
General Counsel
JEFFREY M. SILOW
Attorney
National Clearing Corp.

1735 K Street, N. W.
Washington, D. C. 20006
*Counsel For Respondents
In Opposition National
Association of Securities
Dealers, Inc., Bunker Ramo
Corp., National Clearing Corp.*

August, 1976

¹⁸ Petitioner requests the Court to grant the writ based upon, among others, the reason that Respondents had violated the federal antifraud provisions of the securities laws challenged as unconstitutional. There has been no showing, however, of the *prima facie* elements of fraud nor of any alleged injury to the Petitioner. The District Court correctly characterized this attack as a "particularly irrational claim" (App. D of Petition, p. 17a).

APPENDIX

APPENDIX A**SECTION 15A OF THE SECURITIES EXCHANGE ACT OF 1934**

SECTION 15 A. (a) Any association of brokers or dealers may be registered with the Commission as a national securities association pursuant to subsection (b), or as an affiliated securities association pursuant to subsection (d), under the terms and conditions hereinafter provided in this section, by filing with the Commission a registration statement in such form as the Commission may prescribe, setting forth the information, and accompanied by the documents, below specified:

(1) Such data as to its organization, membership, and rules of procedure, and such other information as the Commission may by rules and regulations require as necessary or appropriate in the public interest or for the protection of investors; and

(2) Copies of its constitution, charter, or articles of incorporation or association, with all amendments thereto, and of its existing bylaws, and of any rules or instruments corresponding to the foregoing, whatever the name, hereinafter in this title collectively referred to as the "rules of the association."

Such registration shall not be construed as a waiver by such association or any member thereof of any constitutional right or of any right to contest the validity of any rule or regulation of the Commission under this title.

(b) An applicant association shall not be registered as a national securities association unless it appears to the Commission that—

(1) by reason of the number of its members, the scope of their transactions, and the geographical distribution of its members such association will be able to comply with the provisions of this title and the rules and regulations thereunder and to carry out the purposes of this section.

(2) such association is so organized and is of such a character as to be able to comply with the provisions of this title and the rules and regulations thereunder, and to carry out the purposes of this section.

(3) the rules of the association provide that any broker or dealer who makes use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security otherwise than on a national securities exchange, may become a member of such association, except such as are excluded pursuant to paragraph (4) or (5) of this subsection, or a rule of the association permitted under this paragraph. The rules of the association may restrict membership in such association on such specified geographical basis, or on such specified basis relating to the type of business done by its members, or on such other specified and appropriate basis, as appears to the Commission to be necessary or appropriate in the public interest or for the protection of investors and to carry out the purpose of this section. Rules adopted by the association may provide that the association may, unless the Commission directs otherwise in cases in which the Commission finds it appropriate in the public interest so to direct, deny admission to or refuse to continue in such association any broker or dealer if—

(A) such broker or dealer, whether prior or subsequent to becoming such, or

(B) any person associated with such broker or dealer, whether prior or subsequent to becoming so associated,

has been and is suspended or expelled from a national securities exchange or has been and is barred or suspended from being associated with all members of such exchange, for violation of any rule of such exchange.

(4) the rules of the association provide that, except with the approval or at the direction of the Commission in cases in which the Commission finds it appro-

priate in the public interest so to approve or direct, no broker or dealer shall be admitted to or continued in membership in such association, if such broker or dealer—

(A) has been and is suspended or expelled from a registered securities association (whether national or affiliated) or from a national securities exchange or has been and is barred or suspended from being associated with all members of such association or from being associated with all brokers or dealers which are members of such exchange, for violation of any rule of such association or exchange which prohibits any act or transaction constituting conduct inconsistent with just and equitable principles of trade, or requires any act the omission of which constitutes conduct inconsistent with just and equitable principles of trade.

(B) is subject to an order of the Commission denying, suspending for a period not exceeding twelve months, or revoking his registration pursuant to section 15 of this title, or expelling or suspending him from membership in a registered securities association or a national securities exchange, or barring or suspending him from being associated with a broker or dealer.

(C) whether prior or subsequent to becoming a broker or dealer, by his conduct while associated with a broker or dealer, was a cause of any suspension, expulsion, or order of the character described in clause (A) or (B) which is in effect with respect to such broker or dealer, and in entering such a suspension, expulsion, or order, the Commission or any such exchange or association shall have jurisdiction to determine whether or not any person was a cause thereof.

(D) has associated with him any person who is known, or in the exercise of reasonable care should be known, to him to be a person who, if such person were a broker or dealer, would be ineligible for admission to or continuance in membership under clause (A), (B), or (C) of this paragraph.

(5) the rules of the association provide that, except with the approval or at the direction of the Commission in cases in which the Commission finds it appropriate in the public interest so to approve or direct, no person shall become a member and no natural person shall become a person associated with a member, unless such person is qualified to become a member or a person associated with a member in conformity with specified and appropriate standards with respect to the training, experience, and such other qualifications of such person as the association finds necessary or desirable, and in the case of a member, the financial responsibility of such member. For the purpose of defining such standards and the application thereof, such rules may—

(A) appropriately classify prospective members (taking into account relevant matters, including type of business done and nature of securities sold) and persons proposed to be associated with members.

(B) specify that all or any portion of such standards shall be applicable to any such class.

(C) require persons in any such class to pass examinations prescribed in accordance with such rules.

(D) provide that persons in any such class other than prospective members and partners, officers and supervisory employees (which latter term may be defined by such rules and as so defined shall include branch managers of members) of members, may be qualified solely on the basis of compliance with specified standards of training and such other qualifications as the association finds appropriate.

(E) provide that applications to become a member or a person associated with a member shall set forth such facts as the association may prescribe as to the training, experience, and other qualifications (including, in the case of an applicant for membership, financial responsibility) of the applicant and that the association may adopt procedures for verification of qualifications of the applicant.

(F) require any class of persons associated with a member to be registered with the association in accordance with procedures specified by such rules (and any application or document supplemental thereto required by such rules of a person seeking to be registered with such association shall, for the purposes of subsection (a) of section 32 of this title, be deemed an application required to be filed under this title).

(6) the rules of the association assure a fair representation of its members in the adoption of any rule of the association or amendment thereto, the selection of its officers and directors, and in all other phases of the administration of its affairs.

(7) the rules of the association provide for the equitable allocation of dues among its members, to defray reasonable expenses of administration.

(8) the rules of the association are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to provide safeguards against unreasonable profits or unreasonable rates of commissions or other charges, and in general, to protect investors and the public interest, and to remove impediments to and perfect the mechanism of a free and open market; and are not designed to permit unfair discrimination between customers or issuers, or brokers or dealers, to fix minimum profits, to impose any schedule of prices, or to impose any schedule or fix minimum rates of commissions, allowances, discounts, or other charges.

(9) the rules of the association provide that its members and persons associated with its members shall be appropriately disciplined, by expulsion, suspension, fine, censure, or being suspended or barred from being associated with all members, or any other fitting penalty, for any violation of its rules.

(10) the rules of the association provide a fair and orderly procedure with respect to the disciplining of members and persons associated with members and the denial of membership to any broker or dealer seeking membership therein or the barring of any person

from being associated with a member. In any proceeding to determine whether any member or other person shall be disciplined, such rules shall require that specific charges be brought; that such member or person shall be notified of, and be given an opportunity to defend against, such charges; that a record shall be kept; and that the determination shall include—

(A) a statement setting forth any act or practice in which such member or other person may be found to have engaged, or which such member or other person may be found to have omitted.

(B) a statement setting forth the specific rule or rules of the association of which any such act or practice, or omission to act, is deemed to be in violation.

(C) a statement whether the acts or practices prohibited by such rule or rules, or the omission of any act required thereby, are deemed to constitute conduct inconsistent with just and equitable principles of trade.

(D) a statement setting forth the penalty imposed.

In any proceeding to determine whether a broker or dealer shall be denied membership or whether any person shall be barred from being associated with a member, such rules shall provide that the broker or dealer or person shall be notified of, and be given an opportunity to be heard upon, the specific grounds for denial or bar which are under consideration; that a record shall be kept; and that the determination shall set forth the specific grounds upon which the denial or bar is based.

(11) the requirements of subsection (c), insofar as these may be applicable, are satisfied.

(12) the rules of the association include provisions governing the form and content of quotations relating to securities sold otherwise than on a national securities exchange which may be disseminated by any member or any person associated with a member, and

the persons to whom such quotations may be supplied. Such rules relating to quotations shall be designed to produce fair and informative quotations, both at the wholesale and retail level, to prevent fictitious or misleading quotations, and to promote orderly procedures for collecting and publishing quotations.

The provisions of this subsection, as in effect prior to the date of enactment of the Securities Acts Amendments of 1964, shall be applicable to the rules of any registered securities association which was registered on such date until July 1, 1964. After July 1, 1964, the Commission may, after notice and opportunity for hearing, suspend the registration of any such association if it finds that the rules thereof do not conform to the requirements of this subsection, as amended by section 7 of the Securities Acts Amendments of 1964, and any such suspension shall remain in effect until the Commission issues an order determining that such rules have been modified to conform with such requirements.

(e) The Commission may permit or require the rules of an association applying for registration pursuant to subsection (b), to provide for the admission of an association registered as an affiliated securities association, pursuant to subsection (d) to participation in said applicant association as an affiliate thereof, under terms permitting such power and responsibilities to such affiliates, and under such other appropriate terms and conditions, as may be provided by the rules of said applicant association, if such rules appear to the Commission to be necessary or appropriate in the public interest or for the protection of investors and to carry out the purposes of this section. The duties and powers of the Commission with respect to any national securities association or any affiliated securities association shall in no way be limited by reason of any such affiliation.

(d) An applicant association shall not be registered as an affiliated securities association unless it appears to the Commission that—

(1) such association, notwithstanding that it does not satisfy the requirements set forth in paragraph (1) of subsection (b), will, forthwith upon the registration thereof, be admitted to affiliation with an association registered as a national securities association pursuant to said subsection (b), in the manner and under the terms and conditions provided by the rules of said national securities association in accordance with subsection (c); and

(2) such association and its rules satisfy the requirements set forth in paragraphs (2) to (10), inclusive, and paragraph (12), of subsection (b); except that in the case of any such association any restrictions upon membership therein of the type authorized by paragraph (3) of subsection (b) shall not be less stringent than in the case of the national securities association with which such association is to be affiliated.

(e) Upon the filing of an application for registration pursuant to subsection (b) or subsection (d), the Commission shall by order grant such registration if the requirements of this section are satisfied. If, after appropriate notice and opportunity for hearing, it appears to the Commission that any requirement of this section is not satisfied, the Commission shall by order deny such registration. If any association granted registration as an affiliated securities association pursuant to subsection (d) shall fail to be admitted promptly thereafter to affiliation with a registered national securities association, the Commission shall revoke the registration of such affiliated securities association.

(f) A registered securities association (whether national or affiliated) may, upon such reasonable notice as the Commission may deem necessary in the public interest or for the protection of investors, withdraw from regis-

tration by filing with the Commission a written notice of withdrawal in such form as the Commission may by rules and regulations prescribe. Upon the withdrawal of a national securities association from registration, the registration of any association affiliated therewith shall automatically terminate.

(g) If any registered securities association (whether national or affiliated) takes any disciplinary action against any member thereof or any person associated with such a member or denies admission to any broker or dealer seeking membership therein, or bars any person from being associated with a member, such action shall be subject to review by the Commission, on its own motion, or upon application by any person aggrieved thereby filed within thirty days after such action has been taken or within such longer period as the Commission may determine. Application to the Commission for review, or the institution of review by the Commission on its own motion, shall operate as a stay of such action until an order is issued upon such review pursuant to subsection (h), unless the Commission otherwise orders after notice and opportunity for hearing on the question of a stay (which hearing may consist solely of affidavits and oral arguments).

(h)(1) In a proceeding to review disciplinary action taken by a registered securities association against a member thereof or a person associated with a member, if the Commission, after appropriate notice and opportunity for hearing, upon consideration of the record before the association and such other evidence as it may deem relevant—

(A) finds that such member or person has engaged in such acts or practices, or has omitted such act, as the association has found him to have engaged in or omitted, and

(B) determines that such acts or practices, or omission to act, are in violation of such rules of the association as have been designated in the determination of the association,

the Commission shall by order dismiss the proceeding, unless it appears to the Commission that such action should be modified in accordance with paragraph (2) of this subsection. The Commission shall likewise determine whether the acts or practices prohibited, or the omission of any act required, by any such rule constitute conduct inconsistent with just and equitable principles of trade, and shall so declare. If it appears to the Commission that the evidence does not warrant the finding required in clause (A), or if the Commission determines that such acts or practices as are found to have been engaged in are not prohibited by the designated rule or rules of the association, or that such act as is found to have been omitted is not required by such designated rule or rules, the Commission shall by order set aside the action of the association.

(2) If, after appropriate notice and opportunity for hearing, the Commission finds that any penalty imposed upon a member or person associated with a member is excessive or oppressive, having due regard to the public interest, the Commission shall by order cancel, reduce, or require the remission of such penalty.

(3) In any proceeding to review the denial of membership in a registered securities association or the barring of any person from being associated with a member, if the Commission, after appropriate notice and hearing, and upon consideration of the record before the association and such other evidence as it may deem relevant, determines that the specific grounds on which such denial or bar is based exist in fact and are valid under this section, the Commission shall by order dismiss the proceeding; otherwise, the Commission shall by order set aside the action of the association and require it to admit the applicant broker or dealer to membership therein, or to permit such person to be associated with a member.

(i) (1) The rules of a registered securities association may provide that no member thereof shall deal with any nonmember broker or dealer (as defined in paragraph (2) of this subsection) except at

the same prices, for the same commissions or fees, and on the same terms and conditions as are by such member accorded to the general public.

(2) For the purposes of this subsection, the term "non-member broker or dealer" shall include any broker or dealer who makes use of the mails or of any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security otherwise than on a national securities exchange, who is not a member of any registered securities association, except a broker or dealer who deals exclusively in commercial paper, bankers' acceptances, or commercial bills.

(3) Nothing in this subsection shall be so construed or applied as to prevent any member of a registered securities association from granting to any other member of any registered securities association any dealer's discount, allowance, commission, or special terms.

(j) Every registered securities association shall file with the Commission in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, copies of any changes in or additions to the rules of the association, and such other information and documents as the Commission may require to keep current or to supplement the registration statement and documents filed pursuant to subsection (a). Any change in or addition to the rules of a registered securities association shall take effect upon the thirtieth day after the filing of a copy thereof with the Commission, or upon such earlier date as the Commission may determine, unless the Commission shall enter an order disapproving such change or addition; and the Commission shall enter such an order unless such change or addition appears to the Commission to be consistent with the requirements of subsection (b) and subsection (d).

(k) (1) The Commission is authorized by order to abrogate any rule of a registered securities asso-

ciation, if after appropriate notice and opportunity for hearing, it appears to the Commission that such abrogation is necessary or appropriate to assure fair dealing by the members of such association, to assure a fair representation of its members in the administration of its affairs or otherwise to protect investors or effectuate the purposes of this title.

(2) The Commission may in writing request any registered securities association to adopt any specified alteration of or supplement to its rules with respect to any of the matters hereinafter enumerated. If such association fails to adopt such alteration or supplement within a reasonable time, the Commission is authorized by order to alter or supplement the rules of such association in the manner theretofore requested, or with such modifications of such alteration or supplement as it deems necessary if, after appropriate notice and opportunity for hearing, it appears to the Commission that such alteration or supplement is necessary or appropriate in the public interest or for the protection of investors or to effectuate the purposes of this section, with respect to—

(A) the basis for, and procedure in connection with, the denial of membership or the barring from being associated with a member or the disciplining of members or persons associated with members, or the qualifications required for members or natural persons associated with members or any class thereof.

(B) the method for adoption of any change in or addition to the rules of the association.

(C) the method of choosing officers and directors.

(D) affiliation between registered securities associations.

(1) The Commission is authorized, if such action appears to it to be necessary or appropriate in the public interest or for the protection of investors or to carry out the purposes of this section—

(1) after appropriate notice and opportunity for hearing, by order to suspend for a period not exceed-

ing twelve months or to revoke the registration of a registered securities association, if the Commission finds that such association has violated any provision of this title or any rule or regulation thereunder, or has failed to enforce compliance with its own rules, or has engaged in any other activity tending to defeat the purposes of this section.

(2) after appropriate notice and opportunity for hearing, by order to suspend for a period not exceeding twelve months or to expel from a registered securities association any member thereof, or to suspend for a period not exceeding twelve months or to bar any person from being associated with a member thereof, if the Commission finds that such member or person—

(A) has violated any provision of this title or any rule or regulation thereunder, or has effected any transaction for any other person who, he had reason to believe, was violating with respect to such transaction any provision of this title or any rule or regulation thereunder.

(B) has willfully violated any provision of the Securities Act of 1933, as amended, or of any rule or regulation thereunder, or has effected any transaction for any other person who, he had reason to believe, was willfully violating with respect to such transaction any provision of such Act or rule or regulation.

(3) after appropriate notice and opportunity for hearing, by order to remove from office any officer or director of a registered securities association who, the Commission finds, has willfully failed to enforce the rules of the association, or has willfully abused his authority.

(m) Nothing in this section shall be construed to apply with respect to any transaction by a broker or dealer in any exempted security.

(n) If any provision of this section is in conflict with any provision of any law of the United States in force on the date this section takes effect, the provision of this section shall prevail.

APPENDIX B

§ 240.15Aj-2 RULES OF A NATIONAL SECURITIES ASSOCIATION
RELATING TO A SYSTEM OF SECURITIES QUOTATIONS.

(a) Any national securities association which adopts, or proposes to adopt, any rules providing for or regulating a system for the quotation of bid or offering or other prices of securities shall incorporate in such rules a provision to the effect that insofar as such rules prescribe the conditions of access to such system, such rules shall be applied and interpreted in accordance with the standards of subparagraphs 8 and 12 of paragraph (b) and paragraph (h)(2) of section 15A of the Act, including the requirement that rules of such an association shall be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market, and not to permit unfair discrimination between customers or issuers, or brokers or dealers; to produce fair and informative quotations, both at the wholesale and retail level, to prevent fictitious or misleading quotations, and to promote orderly procedures for collecting and publishing quotations; and to assure that any disciplinary action pursuant to such rules shall not be excessive or oppressive, having due regard to the public interest.

(b) Such rules shall also provide a fair and orderly procedure with respect to the determination of whether any customer or issuer or broker or dealer may be excluded or limited in respect of requested access to such system including provisions:

- (1) For notice of and opportunity to be heard upon the specific grounds for exclusion or limitation which are under consideration;
- (2) That a record shall be kept; and
- (3) That the determination shall set forth the specific grounds upon which the exclusion or limitation is based.

(c) In the event of any such exclusion or limitation, such action shall be subject to review by the Commission, on its own motion or upon application by any person aggrieved thereby filed within 30 days after such action has been taken or within such longer period as the Commission may determine. In any proceeding for such review, if the Commission, after appropriate notice and opportunity for hearing, and upon consideration of the record before the association and such other evidence as it may deem relevant, determines that the specific grounds on which such action is based exist in fact and are in accord with the applicable rules of the association (including the provisions thereof required to be included by paragraph (a) of this section), the Commission shall by order dismiss the proceeding. Otherwise, the Commission shall by order set aside the action of the association and require the association to accord the aggrieved person access to such system or to take such other action as may be appropriate, subject to such terms and conditions as the Commission determines to be in accordance with the public interest and consistent with the rules of such association.

(15 U.S.C. 78o, 78o-3) [33 F.R. 19167, Dec. 24, 1968]

APPENDIX C**§ 240.15Aj-3 RULES FOR A NATIONAL SECURITIES ASSOCIATION RELATING TO A FACILITY FOR CLEARING AND/OR SETTLING SECURITIES TRANSACTIONS.**

(a) Any national securities association which directly or indirectly adopts, or proposes to adopt, any rules providing for or regulating a system for the clearance and/or settlement of securities transactions shall incorporate in such rules a provision to the effect that insofar as such rules prescribe the conditions of access to such system, such rules shall be applied and interpreted in accordance with the standards of paragraph (b)(8) of section 15A of the Act, including the requirement that rules of such an association shall be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market, and not to permit unfair discrimination between customers or issuers, or brokers or dealers; and to assure that any disciplinary action pursuant to such rules shall not be excessive or oppressive, having due regard to the public interest.

(b) Such rules shall also provide a fair and orderly procedure with respect to the determination of whether any customer or issuer or broker or dealer may be excluded or limited in respect of requested access to such system including provisions:

(1) For notice of an opportunity to be heard upon the specific grounds for exclusion or limitation which are under consideration;

(2) That a record shall be kept; and

(3) That the determination shall set forth the specific grounds upon which the exclusion or limitation is based.

(c) In the event of any such exclusion or limitation, such action shall be subject to review by the Commission, on its own motion, or upon application by any person ag-

grieved thereby filed within 30 days after such action has been taken or within such longer period as the Commission may determine. In any proceeding for such review, if the Commission, after appropriate notice and opportunity for hearing, and upon consideration of the record before the association and such other evidence as it may deem relevant, determines that the specific grounds on which such action is based exist in fact and are in accord with the applicable rules of the association (including the provisions thereof required to be included by paragraph (a) of this section), the Commission shall by order dismiss the proceeding. Otherwise, the Commission shall by order set aside the action of the association and require the association to accord the aggrieved person access to such system or to take such other action as may be appropriate, subject to such terms and conditions as the Commission determines to be in accordance with the public interest and consistent with the rules of such association.

(Sec. 15A(j), 52 Stat. 1070, 15 U.S.C. 78o-3(j); sec. 23(a)) [37 F.R. 6851, Apr. 5, 1972].